

104

THE EFFECTS OF SUPERFUND LIABILITY ON SMALL BUSINESSES

Y 4. SM 1:104-55

The Effects of Superfund Liability...

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, OCTOBER 19, 1995

Printed for the use of the Committee on Small Business

Serial No. 104-55



SEP 24 1996

U.S. GOVERNMENT PRINTING OFFICE

20-567cc

WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-052951-4

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THE EFFECTS OF SUPERFUND LIABILITY ON SMALL BUSINESSES

THURSDAY, OCTOBER 19, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room 2359, the Honorable Jan Meyers (chair of the Committee), presiding.

Chair MEYERS. The meeting will come to order, please. The subject of today's hearing, Superfund reform, is an issue of great importance to this Nation's small businesses. At the recently concluded White House Conference on Small Business, meaningful reform of Superfund, particularly the liability system, ranked as the number five recommendation of the conference participants.

Superfund, which was created with the enactment of the Comprehensive Environmental Response, Compensation and Liability Act, CERCLA, in 1980, has long been considered a program in need of major reforms. Since its inception 15 years ago, Superfund has been the target of much criticism.

For many who are familiar with the Superfund liability system, the program appears, to some, to be more of a cash cow for environmental lawyers than an efficient mechanism for cleaning up hazardous waste sites. Hopefully, we can address some of these concerns today.

Our witnesses for today's hearing include Assistant Attorney General Schiffer who, as head of the Environmental and Natural Resources Division of the U.S. Department of Justice, is charged with the enforcement of our Federal environmental laws.

Joining her on our first panel are three noted experts on the issues surrounding Superfund. From Citizens for a Sound Economy we have with us today Susan Eckerly, director of regulatory policy. From the Small Business Survival Committee we have chief economist Raymond Keating. Our final witness on panel one will be John Shanahan, a policy analyst specializing in environmental issues at the Heritage Foundation.

Our second panel today is comprised of four small businessmen who have had the great displeasure of being caught up in Superfund litigation. These witnesses will give us a first-hand account of their experiences with the Superfund liability system and their insights for meaningful reform.

Mr. John DeVinck and Mr. Kelvin Herstad are here today from the upper Midwest and from their testimony I understand that they have experiences with the same Superfund site in northern

Minnesota. Mr. Quinn is here today from New Hampshire and has served on Congressman Zeff's New Hampshire Superfund Task Force. Our final witness today is David Norwine from New Jersey.

Before we start, I want to briefly recognize all the hard work one of our Committee members, Bill Zeff, has done in the area of Superfund reform. I know there are others on the Committee who have worked on this issue as well, but Mr. Zeff has a bill pending and has worked very hard on it this year.

The issues involved in Superfund reform are very difficult and can be highly contentious, and I applaud Congressman Zeff for his efforts to assist small business with meaningful reform.

Another who has had a tremendous interest in Superfund reform is Mr. John LaFalce, ranking member on the Committee, and at this time I will yield to him for any opening remarks he may have.

[Chair Meyers statement may be found in the appendix.]

Mr. LAFALCE. Thank you very much, Madam Chair.

I welcome our Committee's hearing on this important topic, as Superfund holds a strong personal significance for me. In many ways, this law was a response to the public outcry and environmental awakening that followed the discovery of problems at Love Canal, an abandoned hazardous waste site in my congressional district. I therefore was extremely pleased to see it enacted.

I, in a sense, discovered Love Canal in 1977 and quickly learned that there was no comprehensive legal framework to deal with such problems. One had to proceed on a very, very difficult ad hoc basis. It was necessary to try to get specially earmarked monies. I remember working with Senator Jacob Javits in order to accomplish exactly that.

There was a strong bipartisan effort to develop that comprehensive legal framework called CERCLA, or Superfund. It was not partisan. As a matter of fact, the final legislation was agreed to in the lame duck session that took place ultimately in the office of Senator Howard Baker, a great Republican from Tennessee, in December 1980, and it was really Senator Baker who provided the final impetus for resolving the various contentious issues.

Since its passage, it has received both great praise and great criticism. Increasingly, however, the commentary has become more critical. Few believe that Superfund represents the best work that the minds of man could have devised and few believe that Superfund has been implemented as effectively, efficiently or fairly as it should have been.

A number of stories exist about Superfund's unfair treatment of individuals, businesses, lenders, insurers and others. I know we will hear many of those stories today. Some of this criticism may well be justified.

Over the past several years, we have had many hearings in this Committee on one area that I thought cried out for redress and that was lender liability under Superfund. I remember being approached by the then-mayor of Rochester about 5 years ago, being told, "We have a section in our city where businesses simply can't get any money from lenders." I said, "Well, let me go talk to them. We're on the Banking Committee. We'll try to be helpful."

All of a sudden we found out that these people were being denied any financial assistance because of where they were. It happened

to be an old garbage dump that had been reclaimed, et cetera, but the bank just wouldn't give them a penny.

I said, "Well, we'll just bring SBA into the picture and get some type of SBA guarantee, if possible," and the SBA said, "Well, here's a legal memo. The legal memo says if we should guarantee these loans, we guarantee a loan for \$50,000 and then later it's discovered that there might be a cleanup required costing \$5 million, we could be responsible for the \$5 million cleanup just for guaranteeing the \$50,000 loan." And I said, "That cries out for remedy. That cries out for reform."

We began an effort and it's taken 5 years and we still haven't been able to pass it. We do have it now in the Banking Committee legislation that we're reporting out, and hopefully it'll come to the floor and it will pass.

So, I'm well aware that there are imperfections and court interpretations have not helped us at all in a good many instances, either. That's one where the courts, I think, went awry.

But whatever Superfund's imperfections, we should not forget that it does address a real concern that we can't ignore. Abandoned hazardous waste sites exist. Cleanup must take place. Someone must pay for it.

So, the questions we faced in 1980 are the same questions we are faced with today. Who will pay for the cleanup of hazardous wastes? How much will they have to pay? How will it be decided?

A formula was reached in 1980. We can improve the formula. In trying to do that, we ought not place too great a burden on our small businesses. We ought not unfairly burden those having no or, at most, minimal causal connection to the problem. We also ought not dig deeper into our Government coffers and taxpayers' pockets to relieve liability.

I hope our witnesses will be able to give us some insight into how these tough choices can be made wisely. I thank the Chair.

Chair MEYERS. Thank you very much, Mr. LaFalce. Without objection, all Members can submit opening statements for the record, and I wish we had time to listen to all of them but we have a number of witnesses today.

[Mr. Zeliff's statement may be found in the appendix.]

[Mr. Manzullo's statement may be found in the appendix.]

[Mr. Flake's statement may be found in the appendix.]

[Mr. Poshard's statement may be found in the appendix.]

Chair MEYERS. Let me say our first witness is the Honorable Lois J. Schiffer, and she is the Assistant Attorney General of the Environmental and Natural Resources Division, U.S. Department of Justice. Ms. Schiffer has to leave because of a prior commitment and so following her testimony, I'm going to have a brief period of questioning, and I think I'll try to contain that in terms of time, if we can, because of Mrs. Schiffer's conflict. So, I'll ask the indulgence of the Committee in that. Ms. Schiffer.

TESTIMONY OF THE HONORABLE LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. SCHIFFER. Good morning, Chair Meyers and members of the Committee. Thank you for the opportunity to appear here this

morning to address the important issue of the impact of the Superfund liability system on small businesses. I'd also like to thank you particularly for accommodating my schedule, Congresswoman Meyers, as you've said you would. I'm quite grateful.

The Superfund liability system has one primary purpose: To get hazardous waste sites that pose a threat to public health and the environment cleaned up. Congressman LaFalce, I think that you made that point very effectively in your opening statement.

Today private parties conduct 75 percent of Superfund cleanups, and only 25 percent are conducted by the Government, using the Superfund money. We need to keep this basic fact in mind as we consider the various proposals to reform Superfund. Without the private funding brought in by the liability system and the efficiencies gained by private party-conducted cleanups, many, many site cleanups would not take place and there would be a much bigger hit on the American taxpayer.

In order to accomplish the goal of getting Superfund sites cleaned up with enough money to do it and with reductions in transaction costs, the liability system has to be supported by a sound and workable legal framework. That support is provided by the three core principles of Superfund liability: Strict, joint and several liability, and so-called retroactive liability.

Without strict and joint and several liability, we would not be able to convince parties to cleanup Superfund sites or to settle these cases rather than to litigate them. It is settlement rather than litigation that helps to reduce transaction costs.

Retroactive liability, which has come to mean paying for disposal that took place before the Superfund law was enacted in 1980, is necessary because the majority of the actions that created the hazardous waste sites that we are dealing with in the Superfund program, occurred before 1980, and the Love Canal site is, of course, the most famous example.

Some legislative proposals have been made to repeal liability for actions that took place before 1987. But 1987 is not really a retroactive liability date. This statute has been in effect since 1980. The Resource Conservation and Recovery statute that also requires cleanups like these but without the fund to do it, was enacted in 1976 and State nuisance laws and the Federal Clean Water Act were on the books even before that. So, people knew that they had some obligations with regard to hazardous wastes.

Repealing liability as of 1987 will repeal virtually all Superfund liability. Ninety-five percent of the activities that created Superfund sites occurred before 1987.

If we are to maintain the responsible party funding of Superfund cleanups and reduce transaction costs and take other steps to help small businesses, we still must maintain the basic liability framework of strict, joint and several and retroactive liability.

Now, the administration wants serious reform of the Superfund statute and certainly of the Superfund program. This administration proposed a bill last year, by which we still stand, that contained far-reaching reforms supported by a wide range of parties affected by Superfund, including the National Federation of Independent Businesses, or NFIB. I must say this coalition proposal really had support all around.

Let's turn to the impact of Superfund liability on small business. Superfund has imposed burdens on small businesses, which we need to address, and I think they are as important as any of the reforms that need to be made in Superfund.

There are problems and they range from insensitive bureaucrats writing letters that none of us would want to receive to people bringing small businesses into a liability system where there's really no reason to have them there, to private companies going after small businesses, even when the Government has determined not to. This administration has recognized those problems and has been working hard to solve them.

You've indicated that on the second panel today you will hear a number of horror stories from the witnesses who appear before you. As you listen to these stories, and we all want to pay attention to those stories, I do want to ask you to keep in mind two questions. When did the problems these people are talking about occur? Would the solutions that the administration has been pursuing for small businesses address the witness's paragraph Superfund problem?

I must say that I personally have spent a lot of time working to make Superfund more user-friendly, with particular attention to small businesses. So, I think that a lot of the problems really occurred a number of years ago.

Now, what are the problems that small businesses encounter when they are pulled into the Superfund system and what are responsible and sensible fixes for these problems? Not repeal of the core liability system, which will increase transaction costs and keep sites from getting cleaned up. That will hurt small businesses just as much as it hurts the rest of the American public, perhaps more.

Contaminated sites will continue to fester in the middle of our communities, consigning what used to be productive industrial or commercial property to brownfields forever and inhibiting new investment and economic redevelopment.

That result is not good for small businesses or for anyone. We need to address the problems of small businesses without throwing the baby out with the bathwater.

We propose or are using six approaches. The first one is what I think of as being user-friendly or a little politeness goes a long way. It's my personal view that people should be treated well by Government employees and that we have to have a culture that helps assure that.

One of the proposals in the coalition Superfund bill was to have an ombudsman at EPA who small businesses or other people could call up and say, "How do I make my way through the system here? How can I have attention paid and my problem solved?"

Since that legislation is still pending, in the meantime, EPA, as part of its administrative reforms, is putting into place having an ombudsman in the EPA regions and we think that that, and making letters more user-friendly, being sure that people get paid attention to, is the first important step in Superfund reform.

Second, for small business generators that contributed very small amounts of waste—a few barrels—we think they should be out of the system completely. The statute we propose would exempt them. In the meantime, we in the Government don't sue them, and if oth-

ers do bring them in in contribution actions, we will cash them out for a dollar so they have protection from such lawsuits. There's a need to have them pay a dollar so that we can give them protection from being gone after further.

Third, is that of so-called de minimis parties, and I've never liked the term but it's in the statute, so there you have it. Those that contributed a small percent of wastes to a site, they should not have to pay a lot for lawyers and get caught up in the transaction costs of the Superfund system. We think they should be offered expedited settlements with the Government that protect them both from further liability to the Government and from contribution actions by other parties.

Last year's coalition legislation would do that, and that's been reintroduced this year in the House.

In the meantime, we have stepped up efforts to settle them out. This administration has been successful in achieving record numbers of settlements with de minimis parties in the last few years. Of the total 11,000 de minimis parties that have been settled out of the Superfund system, almost 8,000 were settled out in the past 3 years.

Fourth, for small businesses who are owners and operators of hazardous waste sites or transporters who cannot afford to pay the high cleanup costs for which they may be responsible, they should be cashed out, and the coalition bill would do that. In the meantime, we now enter into ability to pay settlements that cash them out of the system for what they can afford to pay. What they can afford to pay is determined by financial experts who take a look at what people have and leave them and generally their businesses intact and then determine what they can pay.

Fifth, for the lender liability problem, and you've mentioned that already, lenders need to be assured that foreclosing on a loan without taking over day to day management of the property will not subject them to Superfund liability. EPA and I together have now put in place a lender liability policy which tries to assure that. Certainly it would be better if we get that put into legislation.

Sixth, for the brownfields problems, prospective purchasers who want to redevelop an old Superfund site need protection from liability that they did not contribute to so that they can be encouraged to redevelop the site and turn these brownfields into productive purposes again.

The coalition bill would do these things. In the meantime, EPA and we have prospective purchaser policies in place and we've been entering into prospective purchaser agreements with people so that they can redevelop these properties.

The NFIB agreed that the coalition proposal had the right solutions to their problems when they supported last year's reform bill. We think they are still the right solutions.

That concludes my oral statement and I would be happy to answer the questions that you have. Thank you.

[Ms. Schiffer's statement may be found in the appendix.]

Chair MEYERS. Thank you, Ms. Schiffer. I have just one question and you can answer it by letter because I don't know if you would have these figures.

I'd like to know what the cost to the Government would be if we did, as I think a couple of the bills have suggested, and that is eliminate everyone prior to 1987 or prior to 1980.

Then I think I would like to have two questioners, if we could. I'll yield first to Mr. Bill Zeliff and then to Mr. LaFalce. Then, if we have others who would like to question you before you leave, we can move on from there, but in respect to your time problems, we'll start with Mr. Zeliff and Mr. LaFalce.

Ms. SCHIFFER. Congresswoman Meyers, could I just address the cost questions because we would be pleased to provide you with the information we have. We haven't done our own cost analysis. A number of cost analyses have been done by different groups and we would be glad to put that information together for you and provide it to you.

Chair MEYERS. Thank you. Mr. Zeliff?

Mr. ZELIFF. You mentioned NFIB, I think three times, as supporting the administration's point of view. It is true that last year they did support that coalition but they now support full retroactive liability reform, as well as reform of joint and several liability.

Would you care to comment on that, or can we at least clarify that?

Ms. SCHIFFER. Congressman Zeliff, we think that repeal of joint and several liability will really increase transaction costs because it will take away the incentive for people to settle out of the system and it means that we'll go to more litigation rather than less litigation, when we're trying to get the lawyers out of the system. Even though I'm a lawyer, I appreciate that we want to try to reduce the role of lawyers in the system.

As for full retroactive liability repeal, we continue to think that that will be so expensive that basically we won't get our Superfund sites cleaned up and there would be a significant problem.

Mr. ZELIFF. Then you agree, then, NFIB supported the administration last year but it's supporting full reform this year, full retroactive reform, full reform of strict, joint and several liability and is part of the coalition efforts that we're working on this year.

I just want to make that point clear because I think it's misleading to say that the NFIB supports a position other than what they're currently supporting.

Ms. SCHIFFER. I certainly don't mean to be in any way misleading, Congressman Zeliff. What I do know is that last year the coalition proposal, which had the items that I mentioned, had very broad-based support, including support by the NFIB.

Mr. ZELIFF. I'll say that H.R. 3800 last year was a big improvement. It just didn't go far enough. I've been thrown into a problem that I have the fourth highest density of Superfund sites in the country so I've unfortunately had to get involved in this thing right after I got elected.

The sad thing is we talk about how friendly we are to the PRP's, as a Federal Government. Let me just ask you a question. Do you know of any law that's on the books today that is more of a disgrace than Superfund?

Ms. SCHIFFER. Congressman Zeliff, I think that the Superfund Program is a very important program for getting hazardous waste

sites cleaned up and I appreciate that you have so many in your district, and I'm sure you want to get them cleaned up, too.

I think improvements can be made. I've indicated that we're working at it, and that includes working at having people be more cooperative with people who are in the Superfund system. I'm not saying we're perfect. I think we have a way to go.

Mr. ZELIFF. I think the problem really is if you hold somebody responsible for something that they did that was perfectly legal before the law was passed in 1980, when CERCLA was passed, isn't that unAmerican, unfair, wrong? Isn't it just something we ought to recognize and fix?

Ms. SCHIFFER. Congressman Zeliff, I think the core liability system of Superfund, which includes strict, joint and several and retroactive liability, is fair and I think repeal of it would be unfair.

Basically there are a lot of companies that have now stepped up to the plate over the last 15 years. They've done their cleanups. They've reformed the way they do business and they've reduced their waste streams.

At this point, repealing liability would reward the companies that haven't stepped up to the plate and competitively penalize those companies that have undertaken these obligations. I think that isn't fair. I think it's very American to have the people who created the pollution clean it up and I think that's what that core liability system does.

I think there's a lot of room for improvement in the Superfund law, but I think the core liability system helps us to get these sites cleaned up fairly.

Mr. ZELIFF. I believe the Federal Government provided funds of \$1.6 billion in 1980, \$10.2 billion in 1986, \$15.2 billion in 1990, between \$25 to \$30 billion, and that doesn't count the private sector contribution.

As a result of that, 18 percent of the sites have been cleaned up. Don't you think that the record is nothing—I think I heard in your testimony that we've made so much progress. Is 18 percent a lot of progress?

Ms. SCHIFFER. Congressman Zeliff, I have a pipeline chart I sometimes bring and that we would be very pleased to provide to the Committee that was prepared about 6 months ago, and EPA is actually preparing a new one.

What it shows is that of the sites that are on the national priorities list, over 90 percent of them, some action has begun on. These numbers are now approximate and I'll get you the exact ones but about 6 months ago, of those 1,300 sites, 278 of them had what was called construction complete. That is, they had gotten that far along, which is pretty far along in the cleanup process. Within the past 6 months, that number has gone up to approximately 350. Much more progress has been made on getting these Superfund sites moved along and cleaned up in the past several years.

So, I think you really have to look at the whole chart to see what progress is being made, and substantial progress is being made. But I would be pleased to provide that chart to the Committee.

Mr. ZELIFF. Just one last comment, and I appreciate the opportunity. I don't want to take all the questions.

We obviously have a major difference of opinion on how to get the job done, and I think that was indicative of last year and also this year's debate. In your estimation, if you took a look at full repeal of retroactive liability, and I would hope that you had at least looked at it, how much would it cost to cleanup and do a full repeal? Instead of what we're now spending, what do you think would be the cost of full repeal?

Ms. SCHIFFER. Congressman Zelif, the Justice Department hasn't developed its own numbers. What we have is the numbers that have been developed by the Congressional Budget Office and others. They show that it would be very expensive and that basically the effect would something that would stop us from really cleaning up a lot more sites or have the American taxpayer have to pay for it. I would be pleased to provide those numbers to you and Congresswoman Meyers.

Mr. ZELIFF. My guess, it would be somewhere between \$2.2 and \$2.5 billion. If you remove the liability stream process, both joint and several and retroactive liability, there would be enough money in the system that, in terms of reforming the system, could be actually put to cleanup that we could justify full repeal. I just would encourage you to at least take a look at it.

The only last question I'll just ask is how much money does the Justice Department spend on Superfund legal activity? Is it in excess of \$30 million?

Ms. SCHIFFER. The Justice Department—our budget for the past fiscal year, which is the one where I have the numbers in mind, had a Superfund component of about \$30 million, but for that we recovered for the Superfund over \$300 million and we got an additional over \$300 million and it was significantly more than over \$300 million in people doing cleanup. So, it's a very efficient amount of money that's being spent.

But I would be pleased to provide you with those numbers. My understanding is that those additional billions that you mentioned for full repeal would be the additional cost per year. That's the order of magnitude. But I would like to provide the Committee the numbers that we have.

Mr. ZELIFF. Thank you very much.

Ms. SCHIFFER. Thank you.

Chair MEYERS. Thank you, Mr. Zelif. Mr. LaFalce.

Mr. LAFALCE. Thank you, Madam Chair.

Ms. Schiffer, let me make it clear, you in no way misled anyone. You made it quite clear that you were referring to the legislation in the previous Congress which virtually every group, including the groups that you've mentioned, had agreed to when everyone was proceeding in good faith to reconcile valid but competing interests—valid environmental interests, valid business interests, et cetera, and there was a reconciliation.

The situation has changed and now individuals think they can strike a better bargain on the scales and they are attempting to do that, and that's understandable. But you did not mislead anyone at all.

Let's try to understand this problem in perspective. I mentioned a bit about how it came to be passed. The final bargain was struck in the office of Senator Howard Baker of Tennessee, the reason

being, of course, in the November elections the Senate had—the elections brought the Republicans into control. Senator Howard Baker was going to be the Senate Majority Leader. In order to get something passed in the lame duck session, Howard Baker's voice and opinions were paramount.

During the course of the debate, perhaps the chief opponent of the Superfund legislation was a Congressman from Michigan by the name of David Stockman. His thesis didn't have to do with all these legal niceties, although extremely important. His thesis was this should not be a Federal responsibility; this should be a State responsibility.

In Colorado, there was another legislator who was discussing similar legislation on the State level and her thesis was that this problem—abandoned hazardous waste sites—ought not to be something that's dealt with by the State. This is not a State responsibility; this should be a local responsibility. That was Anne Gorsich Burford.

Now, all of a sudden, we had David Stockman at the head of the OMB at the time that Superfund was to be implemented, and Anne Gorsich Burford as the administrator of EPA at the initial implementation of Superfund, and that presented some problems because neither thought that this should be a Federal responsibility.

Actually, when Superfund was created, I think most of the individuals advocating its—it was necessary to have some comprehensive legal framework to deal with the problem, and there's a big void because no law had existed, from 1976 to 1980, to deal with these abandoned hazardous waste sites. We passed the Resource Conservation and Recovery Act (RCRA) in 1976 to deal with the sites we were going to have but not with the past problems.

But here's where I might differ with you a little bit, Miss Schiffer, and this is perhaps because of the way Superfund evolved. I think what we did envision—maybe I'm wrong—was that the Superfund be used for the cleanup, that we go out and do the cleanup and then worry about whether or not anyone else could pay for it after the fact, if we then could bill parties. I think that the approach that was taken during the first decade at least of Superfund implementation was look to see who we could find responsible first before the cleanup is done.

Now, that's not a purist approach. Obviously there was a little bit of both.

Now, there's a problem with the approach that I envisioned and would have had implemented, too. That's the cost because Superfund could only go as far as there's money in the Superfund. Of course, Superfund gets money by a special type of tax on certain types of businesses, and that's expensive.

Of course, every time you argued for that approach they said, "But you're taxing us too much already; please don't tax us any more." So there are problems involving difficult choices.

I just think it's necessary to understand the history before we proceed. To envision a repeal of liability for actions that took place between 1980 and 1987, in my mind, is absolutely unconscionable. To envision repeal of retroactive liability for anything subsequent to RCRA is unconscionable.

Now, you can argue the merits of it, pre-RCRA, preinitial Superfund, I suppose, but if you do that, you're letting off the hook all those individuals who contributed to it.

Should you apply strict liability on a retroactive basis, as opposed to joint and several? Or should you apply joint and several on a retroactive basis, as opposed to strict? Well, that's a separate question.

I hope we can work together and come up with some decent answers, but let's not throw the baby out with the bathwater. Miss Schiffer?

Ms. SCHIFFER. Thank you, Congressman LaFalce. What I would like to say to both you and Congressman Zeliff, Chair Meyers and the whole Committee is we are very much committed to continuing to work with this Committee and with Congress on these difficult issues. I think while we may sometimes have different approaches, I share Congressman Zeliff's view that we share a common goal on what we want to accomplish here. We really need to keep working together to see how we can go about doing it in a way that best accommodates everybody's concerns.

I appreciate the time that you've given me today and I will certainly provide the information I've indicated. Thank you.

Chair MEYERS. Ms. Schiffer, we have had one other Committee members who asks if he could ask a quick question, if you have just a few minutes more. Mr. Wamp.

Mr. WAMP. I'll be brief, Miss Schiffer. I do want to say that I am grateful to hear that there are some issues that we obviously can agree on, with Mr. LaFalce and you and everyone, because I would like to see reform take place expeditiously.

I personally don't think that a full repeal of retroactive liability is reasonable and hopefully we can strike a compromise. On the flip side, if you don't exempt some NPL sites, that's not reasonable or fair, as well. So, maybe we can.

You mentioned how important settlement is in the process to get private PRP's to pony up. I have a question on how often DOJ or the Federal Government settles where they are a PRP. In my home town of Chattanooga, Tennessee the Federal Government, making ammunition during the war, dumped a bunch of coal tar in Chattanooga Creek and fortunately last month Chattanooga Creek Tennessee Product site was added to the NPL list, but clearly the Federal Government is a PRP.

How often do you settle those cases and how aggressively? What is your position at DOJ to doing your part to help settle these cases so that cleanup can take place instead of stalemate?

Ms. SCHIFFER. Congressman Wamp, I'm a big believer in settlement on both sides and I've been very clear in my tenure at the Justice Department about the fact that Federal agencies have the same obligations as private people in this regard. We have a section in my division called the Environmental Defense Section that has the responsibility for defending Federal agencies in these cases. They work very hard at settlement, with my encouragement, and we indeed have adopted the use of more alternative dispute resolution to help facilitate settlements at those sites.

So, I can't address the particular site you just mentioned but in general I would say I'm quite committed to settlement and the De-

partment of Justice is quite committed to working with Federal agencies to settle out their liability at those sites, as well.

Mr. WAMP. Thank you, Madam Chairman.

Chair MEYERS. I thank you very much, Mr. Wamp, and thank you, Miss Schiffer, and I'm sorry that you have to leave. Thanks for accommodating us by being here today.

Ms. SCHIFFER. Thank you.

Chair MEYERS. We'll leave the record open because you've all been very accommodating and if you do have questions that you think of that you would like to submit, please make sure that staff has those questions and we will entertain them.

Our next witness is Susan Eckerly, who is director of regulatory policy, Citizens for a Sound Economy. Susan.

TESTIMONY OF SUSAN M. ECKERLY, DIRECTOR OF REGULATORY POLICY, CITIZENS FOR A SOUND ECONOMY

Ms. ECKERLY. Good morning and thank you for inviting me to speak at this hearing. I'm the daughter and wife of small business owners and I am a great fan of small business, obviously, and always appreciate the opportunity to come before the Committee and pay them back for all the goodwill they've brought me with it.

Let me first say that Citizens for a Sound Economy is a 250,000-member research, education and advocacy group that promotes market-based solutions to public policy programs.

In the view of CSE, the Superfund Program represents a textbook example of a broken Federal program in need of repair. Despite the billions that have been spent on the program, it has failed fundamentally to meet its mission to cleanup hazardous waste sites.

Unfortunately, the losers have been small business, urban areas, in many cases, local communities, while the winners too often have been lawyers and the EPA budget.

This Congress has the opportunity to enact significant reform of the program and show how a reformed program can actually cleanup sites faster and cheaper. In our view a central element to reaching this goal is full repeal of retroactive liability.

Let me also say in the rush to enact a reform bill this year I think we should examine closely whether the legislation that has recently been proposed by the Commerce Committee indeed will include the necessary reforms. CSE is hesitant to support partial reform this year based on a premise that the program can be fixed later. We instead support legislation that will solve the current problems and speed the pace of cleanup at a lower cost.

In my written testimony, and I hope that will be submitted for the record, I outline our principles for reform, which are liability reform, as I've mentioned, improving remedy selection at sites, strengthening State and local government control on the program, and, of course, in CSE's motto, no new taxes.

Let me summarize our position on these issues briefly in the context of what we consider two important legislative proposals on the table: The bill introduced by Congressman Zeliff and the bill introduced yesterday by Representative Oxley. Although I have yet to see the language in the Oxley proposal, I understand it's based on an earlier draft which I have seen. CSE feels the items in both bills

would help fix the problem and relieve the burden on small business.

As stated earlier, let me first address liability reform. As stated earlier, one of the most fundamental reforms of Superfund, particularly with respect to small business, must be eliminating the current retroactive liability system. Representative Zeff is to be commended for taking on this issue and proposing full repeal.

Unfortunately, the bill introduced yesterday by Representative Oxley, from what I understand, backs away from his earlier commitment to full repeal. His principles for reform released in July called retroactive liability unfair and counterproductive and called for a pre-1987 cutoff to truly remove the trial bar from the cleanup equation.

Citing funding problems, which we can certainly understand, the most recent draft proposal eliminates liability for municipal landfills and de minimis contributors and sets up a proportional liability allocation system.

Representative Oxley's new proposal would fail to end one of the most serious problems associated with retroactive liability, which is its effect on the pace of cleanup, which should be our primary goal, and the legal costs involved with the Superfund program. Under his proposal, small business will still have to spend resources to prove their innocence, their level of contribution to waste, or their ability to pay.

Complicating this issue and therefore the importance of the 1987 date is the lack of records that are available for small parties, as opposed to larger business, to prove their innocence. Even the de minimis 1 percent that the Justice Department referred to and that is referred to often in last year's bill can still spell financial ruin for small businesses, who often have little, if any, profit margin to spare, especially if they did not dump illegally at a site.

To his credit, Representative Oxley has been very honest with everyone throughout the drafting of the legislation that financing full repeal would be difficult, and we hope that he will continue to work with the Republican leadership and the Ways and Means and Budget Committees to see if a solution can be found.

We think also this hearing is concentrating on the liability system with respect to small business. That remedy selection is also a very important part of Superfund reform and also will indirectly affect the cost of cleanup costs on small business. I hope that everyone will take a look at the Oxley bill, the remedy selection title of his proposal.

We feel his draft calls for important reforms in terms of that risk assessments of a site be based on the best estimates of risk, that proposed remedies take into account future use of the land, that all options for addressing a site must be considered, including containment, and that the agency must choose a cost-effective solution based on reasonable risk.

I think the Oxley draft also includes other important reforms. It gives State and local governments more control over whether more sites should be added to the national priorities list, and allows states to take control of Superfund sites. An important element for small business and all parties adversely affected by the program is that it limits the number of sites that can be added to the NPL

over the next 7 years and prohibits any new sites from being added after that.

Let me address briefly some of the arguments that are generally brought up against retroactive liability, and some of those, I'm sure, that we will get questioned about.

The first of those is the taxpayer, not the polluter, will pay if retroactive liability is repealed. Supporters of the Superfund Program claim that the current liability scheme is effective because the polluter pays for cleanup. They argue that full repeal will let these polluters off the hook and the taxpayers will have to pay for their wrongdoing.

The current system, however, casts a wide net in search of PRP's and encourages them to file suits to find other parties to minimize their costs. We have all heard the horror stories, and I'm sure we'll hear more in the next panel, of those caught in the net, those who have purchased the land contaminated by others, those who have acted legally at the time they discarded the waste, and those who contributed nothing more than trash to a site. This group includes a large number of small businesses, civic groups and local communities, many of which are hardly what we think of as polluters.

Moreover, the delays and costs of litigation hardly make Superfund an efficient program that the taxpayer can be proud of. A study by National Strategies, Incorporated found that in 1994, transaction costs for the public and private sectors totaled over about \$1.4 billion while roughly \$1.47 billion in cleanup funds were raised. In other words, only a net of \$.13 billion was raised by the Superfund program.

Seeing that my time is coming to a close, let me also address another point, that full repeal cannot be funded unless new taxes are imposed, because this is a current issue stopping full repeal now.

In the search for funds to pay for full repeal, one option floated frequently is imposing new taxes. Proponents of this funding option point to last year's bill that established a tax on the insurance industry. The question is asked, if they agreed to a tax last year, and since they stand to benefit from full repeal, why don't they step to the table this year?

From a political standpoint, one of the major reasons the bill fell apart last year was because the insurance industry was not united over the tax to begin with, and nothing has changed to make them more united this year.

The real issue, however, should be that no new taxes are acceptable, period. We should not forget that taxpayers, corporate and individual, have spent \$12 billion supporting a program that has only completely delisted 83 sites from the national priorities list.

Given that the funding shortfall for full repeal is \$300 to \$800 million, there are a variety of options that have been pointed to that could generate these funds, and hopefully these can continue to be explored.

In conclusion, given the reform nature of this year's Congress, CSE had high hopes at the beginning of this year that meaningful reform could be enacted. We still have hopes, and we urge Congress not to return to the legislation of last year and to continue to work to find a way to fully repeal retroactive liability and help small business.

[Ms. Eckerly's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Ms. Eckerly. We appreciate your being here.

Our next witness is Raymond Keating, chief economist of the Small Business Survival Committee. Welcome, Mr. Keating.

**TESTIMONY OF RAYMOND J. KEATING, CHIEF ECONOMIST,
SMALL BUSINESS SURVIVAL COMMITTEE**

Mr. KEATING. Thank you. Madam Chair and members of the Committee, I thank you for inviting me here today to discuss Superfund's impact on small business and some ideas for reforms. I'll summarize my remarks and ask that my full testimony be placed into the record.

I am chief economist with the Small Business Survival Committee. We're a small business advocacy group, proentrepreneur, profree market, with over 40,000 members across the Nation.

Since its creation in 1980, Superfund has unleashed the bloated bureaucracy and gross inefficiencies of the Federal Government on unsuspecting businesses across the Nation. We can't put it any other way.

It's turned essentially local or, at most, State problems into national woes, set arbitrary and unattainable criteria for compliance, sent legal costs skyrocketing, forced many businesses to close their doors, reduced capital available for investment in certain industries, restrained job growth, and damaged U.S. international competitiveness. Quite a record for one piece of legislation, but there's still more.

Small businesses, whether seeking out additional capital for growth or just fighting to stay alive, are particularly vulnerable to the woes of Superfund. Legal costs, expenditures for cleaning up sites to which they contributed little or nothing, groping through the EPA's bureaucracy and a thick governmental fog obscuring future costs and risks can stop a small business in its track and even kill it.

At the core of Superfund's problems is its mechanism for assigning liability to perfectly innocent parties. If a business disposed of waste, toxic or nontoxic, large or insignificant amounts, in good conscience and in complete accordance with the law, it can still be held liable for the costs of cleaning up the disposal site if it later became a Superfund site.

Notions of responsibility and fairness mean absolutely nothing under Superfund. Indeed, in assigning liability under Superfund, the EPA utilizes highly questionable criteria. We've heard about those today—strict liability, regardless of intent or negligence, retroactive liability, meaning that actions taken before the law was enacted still apply. Joint and several liability can require that one business pay for a cleanup irrespective of the degree of its own contribution to the waste site and without consideration to the total number of contributors. Again, no concept of fair share exists.

Seeking relief, this unfortunate EPA selectee of course files contribution suits against other businesses connected to the waste site.

As one might expect, the system has developed into a costly legal quagmire. Individual Superfund horror stories abound. We will

hear some, I believe, later this morning. They also seem almost too numerous to keep up with.

For now, I'd like to touch upon some of the overall weighty costs of Superfund. As we've heard before, of the waste sites on the Superfund national priority list, only about 18 percent, at best, have been cleaned up, yet the Federal Government has spent more than \$10 billion on Superfund and forced private parties to kick in another \$80 billion. The average NPL site takes 10 years to clean-up at an average cost of \$30 million.

Once caught in a Superfund liability mess, it becomes much more difficult for a firm to attract capital, make investments and therefore, grow and create jobs. Superfund's strict, retroactive and joint and several liabilities create considerable uncertainties for firms. Such unknown costs chase away investors and make expansion plans quite dubious. Small businesses suffer most under these added costs and risks.

Without the Superfund cloud hanging over it, investing in, starting up and expanding a small venture is already quite a risky undertaking. Superfund liabilities only raise the hurdles faced by small business even further.

What should be done? Understanding the constraints of the political process, the Small Business Survival Committee supports a three-step reform plan. As a first step, we support many measures currently under consideration in Congress, including repealing retroactive liability for all actions taken before 1987, as suggested in Congressman Zeliff's Superfund reform bill, thereby eliminating costly litigation at about 80 percent of Superfund sites.

From 1987 forward, liability should be based on to proportion of waste a party contributed to the site. We should also be using science-based risk assessment to determine cleanup remedies.

We should be capping the Superfund national priority list of sites so that the Superfund program can eventually be phased out. Of course, no imposition of any new taxes.

As a second step down the road a little bit but preferably, I would say, in the near term, Superfund should really only be assigning liability to individuals and businesses who broke the law, who were negligent, fraudulent, deceptive, et cetera. This is the only true "polluter pays" scenario. Small businesses or any size business that simply sent waste to a site in an honest manner, in full compliance with the law, should have absolutely no liability. In essence, they are not polluters.

Step three or the final goal of Superfund reform should be essentially to terminate Superfund. In fact, a waste site cleanup is not a Federal issue unless, of course, operated by the Federal Government or undertaken due to some new Federal law or mandate. In these two instances, Federal responsibility is clear. Otherwise, waste site cleanup should be left as a local or, at most, a State issue.

State and local cleanup efforts have proved to be far more efficient, timely and less costly. Local individuals possess a far better understanding of their community's circumstances and their needs than do EPA bureaucrats.

Once again, I thank you for inviting me here today to address the Superfund issue and I'd be glad to answer any questions you might have.

[Mr. Keating's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Keating.

Our final witness in this panel is John Shanahan, policy analyst of environmental affairs and energy studies for the Heritage Foundation. Mr. Shanahan?

TESTIMONY OF JOHN C. SHANAHAN, POLICY ANALYST, ENVIRONMENTAL AFFAIRS AND ENERGY STUDIES, THE HERITAGE FOUNDATION

Mr. SHANAHAN. Madam Chair and members of the Committee, thank you for inviting me here to testify on CERCLA. CERCLA, or Superfund, as it's more commonly known, is widely regarded as a wasteful and ineffective program in dire need of substantive reform. To have true reform, however, we must correct the fundamental flaws in the current program rather than tinkering around the edges, as did last year's bill.

Reforms should address the core elements of the Superfund structure that fuel litigation, slow cleanups and raise costs. The political key to real reform is to end the in-fighting between industry sectors over which sector will win and which will lose, with changes in the law. Instead the focus should be on benefiting all industry sectors, so that even if the mix of benefits is uneven, the least benefited sector or company is substantially better off under the new law.

I cannot stress this point enough. All industry sectors must benefit if reform is to occur. Setting aside issues of ideology, efficiency or fairness, without the active support of the business community, the process will degenerate into each company vying to cut a deal that benefits itself. Thus, rather than fixing the structure, the new law will merely redistribute wealth to those with the most political muscle. Typically this means big business will benefit at the expense of small business.

The new law should be fair, speed cleanups of sites posing real risks, and reduce costs across the board. Liability reform should eliminate most of the need for lawyers and courts, reduce the total spending by society on Superfund compliance, be fair to those who now pick up the tab for other people's pollution, encourage timely cleanups, reduce potentially responsible parties' annual costs substantially.

Adopting a piecemeal or distributional approach is counterproductive, such as the Commerce bill. If cleanup standards are improved without fully eliminating the current liability system, the inherent unfairness and inefficiency of the current system still will persist. Thus, companies simply will be encouraged to hire more lawyers and fight their battles in court. If the new law cannot fix this problem, it should be deemed a failure.

One of the most publicized criticisms of Superfund is that instead of monies being spent on cleanup, 80 percent has been spent on lawyers. While this figure and perception vastly overstates the actual transaction costs and litigation costs, the underlying substance of the criticism is accurate.

Superfund structure encourages litigation and other transaction costs due to its liability scheme and has led to numerous horror stories of ordinary Americans and small businesses being subjected to millions of dollars in potential liability, often for acts that were considered innocent at the time, and often by individuals that are now long dead.

Joint and several liability is much to blame for causing the legal woes of Superfund. The concept is designed to find somebody, anybody, to pay for the cleanup of hazardous waste. Under the doctrine, the responsible person presented with the tab often only had a small part in creating the problem. In practice, this means the firm with the deep pockets ends up paying for the cleanup created by someone else.

Naturally, any institution identified as a PRP has a strong incentive to prove that others are liable, as well, in order to dilute the costs among more PRP's—often small businesses. Hence, litigation is virtually assured.

Retroactive liability makes firms responsible for activities that took place in the past, when the activity was legal. But holding people responsible for cleanups for actions taken before 1981 is unfair to those caught in its web. It is contrary to the philosophy that underlies this great country.

Even though the fairness argument is not as compelling for eliminating liability for disposal before 1987 as it is before 1981, the 1987 date is preferable for a number of reasons. Most important is that CERCLA is only a liability statute. It does not set rules for disposal. That is done by RCRA and other laws that primarily took effect or were modified from 1980 to 1986.

For example, RCRA's disposal and recordkeeping rules were extended to 175 more entities in 1986—quite a few of them, most of them, small businesses. Most of these companies believed or were legally advised that if they were in compliance with RCRA and other laws they could continue their disposal practices.

The 1987 date is also preferable for the sake of efficiency and lowering total CERCLA costs by society. Until 1987, disposal rules for all parties were not clear, and records under CERCLA are scanty.

If the 1981 date is adopted, protracted court battles and slow cleanups will remain at a large number of sites, with small businesses hurt the most.

Much of the controversy over liability reform centers around funding, financing, how do you pay for it? If retroactive, joint and several liability is eliminated, the Government will be required to fund a program that is otherwise now unfairly borne by PRP's.

While there are different cost projections as to whether or not there would be a shortfall, if there was a shortfall, it would have to be paid or resolved in one of four ways: Either through increased taxes, debt financing, reimbursement delays in terms of paying back the companies for costs incurred after this point and before pay-back, or, number four, scaling back reform to grant only partial relief from retroactive liability. I will focus on two options which, in my estimation, would ensure widespread opposition by creating losers in the process—taxes and partial relief.

Imposing new taxes would create the most insurmountable obstacle. Most of the discussion has focussed on putting those taxes on insurers. The problem with that, and what has been discussed in terms of that, is the idea that insurers are getting off the hook with Superfund reform total liability repeal, but this misses the point. Yes, their liability is cut, but 88 cents out of every dollar in savings that would occur or accrue would go to PRP's, many of them small businesses, not the insurers. Only 12 cents would go to insurers.

Moreover, insurers were asked to contribute \$800 million last year and they agreed to, but that agreement was only made by a very small percentage of the whole industry. The rest were opposed. Eighty percent of the industry was opposed to that tax.

Why I bring up these points is that you are unlikely to see the insurance industry, at this point, agreeing to any future taxes, and I think you will hurt the possibility of reform.

A tax that is proportional to the amount of cost savings to each industry, which would seem a fair approach, is also inadvisable. Any such tax scheme would undoubtedly divide each industry, just as the insurance industry is divided, and widespread support for reform would evaporate. Indeed, a tax of any kind poses not only practical problems but is philosophically inconsistent with the platform upon which this Congress was elected.

Chair MEYERS. Mr. Shanahan, if we can get the buzzers turned off so people can listen, this means we will have two votes, so we're going to conclude your testimony, and then I think I will ask Ms. Velázquez if she has a question and Mr. Bartlett, and then we will all go vote and come back and proceed with further questioning.

Mr. SHANAHAN. Yes. Partial relief also is inadvisable. All of these proposals for partial relief, including the Commerce bill that was recently put forward, creates winners and losers in the process. These approaches adopt carve-outs from liability. Although many small businesses would benefit from this carve-out approach, many others would suffer. The potential problems for small businesses are numerous but are inherent in adopting a partial, carve-out approach.

Moreover, a partial repeal ignores one of the most egregious aspects of Superfund today—litigation costs. Fundamental reform must address the enormous waste and unfairness of the current program's liability scheme that virtually compels companies of all sizes to spend their resources and efforts on lawyers rather than cleanup. Liability should be eliminated for all disposals prior to 1987. Liability after that point should be on a fair share basis. Only this will fix this broken program. Thank you.

[Mr. Shanahan's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Shanahan. I'm going to ask a question and I'd like to have you respond in writing, unless another panel member asks the same question, and then you don't have to respond in writing.

I would just like to get your reaction to something Ms. Schiffer said. She said—I believe I'm quoting her—"If joint and several liability is repealed, companies will not settle without court action, thus increasing litigation."

So, you can either write me a letter or maybe one of the other panel members has that in mind, too.

Ms. Velázquez.

Ms. VELÁZQUEZ. Miss Chair, my question would be addressed to you. I represent a district that has one of the highest cervical cancer rates in the Nation and is surrounded by over 30 Superfund sites.

I am concerned about the fact that as I see this panel, it is one-sided. I would like to know if we will be holding other hearings in which we could bring some human faces, those who have been victims of contamination, if they will have a chance to share their story with us.

Chair MEYERS. I would certainly think we could do that. This issue is not going to be resolved in a hurry, Ms. Velázquez, and I'm sure that we'll be able to do that.

I did let people know that we were holding this hearing, and I would encourage panel members, when you see that we're holding a hearing and if you have someone you would like to speak, I would certainly be happy to entertain the ideas that you have.

Ms. VELÁZQUEZ. I would like to ask if Mr. LaFalce has any reaction to that.

Mr. LAFALCE. Yes, I do have a reaction to that because I had instructed my staff to try to see to it that we have a balanced hearing. I saw that there were six witnesses who I thought were going to be of basically one mind and I thought, gee, we ought to have a balance, not just one person but perhaps an equal number who could give a different, valid, competing perspective as the perspectives of the witnesses are valid, but in competition with other valid perspectives. The best we could do was just to get Miss Schiffer, but were told—my staff tells me we were told we couldn't have the other witnesses as part of this hearing.

Chair MEYERS. Well, I know that we worked with your staff for about a week and a half. We did take the suggestion of Miss Schiffer.

I will say that it's not good policy on this Committee just to hear one side, Mr. LaFalce, but, on the other hand, this is the Small Business Committee, and when we're having a hearing we like to hear an exposition of the problem initially, and I'm sure that we're all going to hear all sides.

Mr. LAFALCE. I'm going to have to object to that very strenuously because—

Chair MEYERS. Your objection is noted.

Mr. LAFALCE. Let me be heard, Madam Chair. You have the opinion that this is the Small Business Committee; therefore we must hear the representatives of the small business organization, and they're almost monolithic in their view. We will never get a balanced perspective. We had to fight to get somebody from the administration to testify today.

Chair MEYERS. The gentleman is out of order at this time and I will recognize Mr. Bartlett for—

Ms. VELÁZQUEZ. Madam Chair, is my 5 minutes over?

Chair MEYERS. I believe it is but—

Ms. VELÁZQUEZ. I just would like to ask if we can work with your staff to hold another hearing where we could bring some of the victims here.

Chair MEYERS. I am sure that we'll be able to do that, Ms. Velázquez. I'm not saying no to your request at all.

Mr. Bartlett.

Mr. BARTLETT. Thank you very much. We have a very brief time before the vote, so I will try to be very brief.

I have the privilege of representing a district that has a lot of small businesses, and I could have filled this hearing and a couple of more hearings with witnesses who come with real horror stories about what this has done to their business, one of them the Sclar family, that runs a junkyard in Frederick, Maryland. They used to buy batteries and then sell them.

The company to whom they were selling batteries went out of business. They sent one load of batteries to a new company. They never got paid for those batteries and they were later on the block for, I think, \$15,000 for their share of cleanup, for one load of batteries that they never even got paid for, and this is just one of many, many instances.

You mentioned four possible remedies or solutions. I think there's perhaps a fifth option here, and that is that we look at the reality of the necessity of cleaning up to the extent we do at some of these sites.

We just passed legislation earlier this year that said that we had to have good science involved and that the cost needed to be justified by the benefit.

My perception is, and nobody wants to live in any contaminated environment, by the way, but it's also true that we don't have to build a day care center, where the children are going to maybe eat the dirt. We don't have to build a day care center on every square inch of property in this country. There are some sites that, I suspect, that we could bring to a satisfactory condition of containment, if it's not spreading anywhere and if the problem will, by and by, go away, and nature has a way of doing that for us.

Maybe one of the things we could do is build a fence around it, plant trees on it, come back in 50 years from now and harvest them.

I think that many of our constituents come to us and from their perspective, this Superfund whole problem comes about as near to insanity as anything that their Government has ever done. I would just like to look at do we really need to go as far as we do in clean-up? Can't we just contain sometimes and then let the thing take care of itself if it's not spreading? Nobody wants it to spread. But there's a wide, wide feeling that we just don't have even a modicum of sanity involved in the implementation of this program.

This is an excellent example of very well intentioned legislation going awry. It was meant to cleanup our environment. Everybody wants to do that. We don't need to do that with the consequences that have occurred here.

I won't ask for comments before we go because we need to go or we're going to miss the vote. I thank you very much.

Chair MEYERS. Thank you, Mr. Bartlett. We will return immediately following—we have two votes, the previous question and a rule, and we will return promptly in about 10 or 15 minutes.

[A short recess was taken.]

Chair MEYERS. Thank you all and we'll reconvene our hearing. Mr. Bartlett, you had concluded your questioning?

Mr. BARTLETT. Yes.

Chair MEYERS. Thank you very much.

Mr. Bentsen.

Mr. BENTSEN. Thank you, Madam Chair. I want to thank the panel for being here today.

Let me ask a couple of questions. Let me start out by saying I've come to this issue—I'm a new Member, as well. I think I actually may have come from a small business. I'm not sure. We only had 300 employees. But there are not many of us in the Congress, on both sides of the aisle, who are businesspeople. A lot are practitioners or lawyers. I am not a lawyer.

Let me say I have a district which has two active Superfund sites, it has 51 hazardous sites that are subject to more review, and a lot of constituents who are obviously concerned about it. I also have a district that has petrochemical industries in it, and has one of the major ship channels and ports in the Nation.

So, those are things that Members of Congress have to balance. We can look at this through various means. We can look at it through economic data, which I was trained at in graduate school. We can look at it from political data, which we are politicians, whether we like it or not. We have to balance all of those things, and that's what makes these issues so difficult.

We can also talk about the horror stories and we can talk about the things that, in fact, the data may not add up—we ought to use better cost-benefit analysis—but then we have to go to places like Barrett Station, where they did have a Superfund site in a poor black neighborhood, which has caused health-related problems and it's proven beyond reasonable doubt.

We go to places like Kennedy Heights, which I share with another Member of Congress, which is a poor and middle class black housing area that was built on top of what used to be pits that Gulf Oil stored oil in. Now we see it collapsing, and so we have to deal with that issue.

We go and look at Goose Creek Elementary School in Baytown, which is a middle and upper middle class area. All of a sudden they have oil oozing up from the ground because it's built over tanks that Exxon used to store gas because we used to store oil directly in the ground, not in the tanks. If you're ever down in Texas or in other oil-producing areas, you see the tanks. We used to put it directly in the ground because that was, at the time, the way that you did it.

That's sort of where we are with the Superfund situation, I think. We've upgraded our practices, our environmental practices.

Let me ask you a couple of questions here. If we go to partial repeal or full repeal of retroactive liability and the cost is anywhere from \$300 million, as I think Miss Eckerly's testimony states, \$300 to \$800 million, or \$2.2 to \$2.5 billion, as Mr. Zeliff, who has obviously followed this situation, who pays for that? Is that just general revenues?

Ms. ECKERLY. Well first of all, let me clarify. When I was talking about \$300 to \$800 million, that's the shortfall that currently exists

when Representative Oxley is trying to find the funding to reach full repeal.

Mr. BENTSEN. Well, good. The shortfall—

Ms. ECKERLY. It does cost about—

Mr. BENTSEN. Where does that money come from?

Ms. ECKERLY. Well, the shortfall, if we're going to find it, we could find it from maybe cutting EPA's overhead. We could find it from better remedy selection at some Federal sites. You can—

Mr. BENTSEN. We only have 5 minutes and—

Ms. ECKERLY. But to the point of where does all this money come from, we do have the Superfund trust fund.

Mr. BENTSEN. But to make up future costs, the shortfall would come from general revenues, whether you cut it from somewhere else in the budget or somewhere else. It would come from general revenues, which are—

Ms. ECKERLY. It could come from general revenues. It could come from savings from elsewhere in the Federal Government.

Mr. BENTSEN. But all the Federal Government is financed through general revenues, and general revenues, the majority of which are taxes, right?

Ms. ECKERLY. Yes.

Mr. BENTSEN. Or user fees, but user fees are taxes, as well if you get down to it.

I understand the concerns about joint and several liability. I signed a lot of joint and several liability contracts when I was in business, so I fully understand how that works, but let me ask you this. To me, this situation, to me—and I also understand the problem of retroactive liability, because of recordkeeping and how you determine it and how that causes litigation.

To me, this is not too dissimilar from the situation that we've been dealing with on the Banking Committee with the savings and loans. We have a situation where we had industry, in many cases, not always but in many cases were doing things, disposing of waste the way that they were allowed under current law—Federal, State, and local. That law has changed. Those regulations have changed. So, now we're going back and trying to clean it up.

We had, in many respects, thrifts, for a variety of reasons—changes in the economy, changes in the structure of finance in this country, disintermediation, but also current regulations which allowed thrifts to do more things than they probably should have been doing, based on capital requirements and others. We decided, as a Nation, the Congress decided at the time to go back in and figure out a way to clean this up.

Why wouldn't it make sense for us, as Congress, to go in and say, "OK, we agree with the 1987 date," or pick the date, whether it's 1987 or whatever, and we agree and we say all things that happened before that, there will be no liability, but what we will do is set up a risk pool which all will contribute to, and you will end all litigation from that point going back because there will be no liability to bring litigation about.

Then the question is, and this may be bad form in this Congress, but then figure out a way to finance that. Since we're already going to finance it with taxes, whether you're moving revenues from one area to another, it's all the same money in the end; why not figure

out a scheme like other risk pools that have been done or like we've done with FICO's and REFCORP's, and we still haggle and the industry still haggles over that—they are haggling over it right now—to finance that?

Wouldn't that be the most efficient way? We say, once and for all, that yes, we're all going to belly up to the bar in this. We all realize it's a responsibility. Industry realizes its a responsibility. Maybe we could address the problem that Mr. Shanahan talked about, which I think was very true because I've had a lot of meetings with people from all industries—oil, petrochemical, et cetera—that we could deal with some of these internal debates that are going on between the industries as to saying, "I'm not going to pay for it; make the other guy pay for it."

As it relates to small business, since we already have an existing Superfund tax that applies, which expires at the end of this year, if I'm correct, it would affect proportionately based on the size of a company, its revenues, et cetera.

I'm not here advocating new taxes but maybe restructuring the way we do it. Why not set it up that way because if we just do partial repeal, we push stuff off on State and local governments and we do away with joint and several liability, which works as long as you can find the actual responsible party but many times that has changed.

Why not just admit that there's a problem and we go back and get together and get beyond ideological differences and set up a pool to cover this? Why would that not be the most efficient way to do this?

Mr. SHANAHAN. Congressman, your idea is actually a very good one in terms of that we should be repealing retroactive liability, clarifying as to that joint and several liability does not apply. In many ways if you do have a funding shortfall, if that actually does exist, there are financial flows, but we do know that the Federal Government, with CERCLA reform, will be seeing an overall reduction in its expenditures, mainly because two-thirds of the program is in what we're talking about today. Two-thirds of the program is spent at Department of Energy and Defense facilities and they're going to see immense savings.

So, you're going to see actually the costs go down. The problem is you run into the budgetary rules. Trying to get the money over from DOD and DOE over to the VA-HUD and Independent Agencies Appropriations Bill is difficult.

So, now we're looking at if there is a shortfall, what is the funding mechanism for that risk pool? Every one of the ones you look at—let's say you look at the size of the company. Every company is going to go into its records. It's going to look at it and say, "What's our outstanding liability? What do they want to impose on us?" They're going to come to you and say we oppose or we agree with that, based on their own bottom line as to whether or not they're a winner or a loser.

Mr. BENTSEN. Yes, and the same would be true, and I was not here when they debated RTC but I've looked at it now and the same would be true from thrifts who said, "We didn't cause any problems. We didn't go to the Government. We didn't default, whether we were a State-chartered thrift or a federally chartered

thrift but still had Federal insurance." Or the banks who said, "That was the thrifts' problems," but they, in the end, were willing to step up to the plate.

Why wouldn't we just come to some agreement and say we're going to clean it up?

There is another part of this problem, which is you still have to—and this is why you get opposition on the environmental side, I think, is you still have to admit that we're going to cleanup and we're not going to try to reduce the amount of cleanup that we're doing.

I agree with setting standards and saying we're not going to cleanup everything to the same standard; we're going to clean it up to what future use is actually going to be. But it just seems to me if we could sit down and try and negotiate this that we could get beyond this ideological divide that we have.

Mr. SHANAHAN. Well, much of those costs are eliminated. I mean, if we were to look at it in terms of risk and real risk, one-third of the sites or 30 percent of the sites pose absolutely no current risk or even any future risk unless you build homes on it, for instance. That's one of the chief assumptions. Well, we know no one's going to be building a home on a Superfund site, so let's put that one aside and let's focus on the 70 percent of the sites which actually may cause some problem. Therefore you're talking about a reduction in the costs.

But it's always coming back to this potential funding shortfall. Some of the ideas that have been floated, the idea of user fees, the green bonds, extending the reauthorization process to, say, 10 years because we know the cost from remedy selection savings are going to recoup immense savings from, say, years 6 out through 10, so we use that to back-end, to help pay for any shortfall in the front end by not reimbursing companies or larger companies, but we do reimburse smaller companies, say.

There's a whole host of financing mechanisms but the key point that you raise is an important one. We should be repealing retroactive liability and joint and several liability.

Mr. BENTSEN. But only if we are willing to say that we're going to fund the thing. I think the concern is that the repeal is just a way to take it away from industry, which is a very broad term, and say we'll put it on the Government, and then the concern there is that—and all taxpayers. Then the concern there is that it won't be financed at that point. Then EPA will come in and say, "Well, instead of dealing with the 2,000 sites that are on the list, we're only going to deal with 1,000 sites on the list," and you have winners and losers in that regard.

So, we're dealing with winners and losers, both on the business side but also on the community side.

Ms. ECKERLY. Congressman, if I may say real quickly, and I don't mean to speak for Mr. Zeliff and his bill but he does have full pre-1987 repeal and he has it funded—he has a proportional allocation system, I believe, whereby the polluters—if there was a responsible party there, they would pay their fair share and this would all be funded by a revolving loan fund, which would come from trust fund monies and revenues currently. That may be an option.

Mr. BENTSEN. With the Chair's indulgence, and I would yield to the gentleman from New Hampshire because it's his bill, the question I would have is, and this is my only really big concern with repealing joint and several liability, is because you do have changes in companies. You have Gulf Oil which is now Chevron and has been through—and I'm not picking on them, but you have other companies that have changed and there's a question as to whether or not that liability transfers with an acquisition. It should but that can be litigated.

The question is also what do you do with Acme Truck Co., of Arcola, Texas, which no longer exists, for instance, which was the primary entity that was responsible? Then what do you do? Does the trust then step in and take care of that? Obviously you are going to have some situations like that.

Mr. ZELIFF. The problem right now, of course, that truck company that no longer exists, under joint and several liability deep pockets ends up picking it up, which is wrong.

Mr. BENTSEN. Sure.

Mr. ZELIFF. But I like your thinking in terms of the analogy with RTC. I'd just like to throw in that I believe very strongly that we've got some problems with CBO. Superfund is very hard to understand. It's technical, it's a problem, and a lot of people aren't willing to give credit.

For example, we have \$1.5 billion annually that comes through on the existing taxes, and there's \$250 million that comes from the general fund, so roughly \$1.8 billion. How much is it going to cost?

I guess my question would be to all three of you, because you all agree that we ought to deal with retroactive liability. If we do that, what is the cost? Is it \$2.2 billion? Is it \$2.4 billion? Is it \$2.5 billion? Does anybody know?

We've had Price Waterhouse and other people look at this. Frankly, they believe that we can fund with the savings and reform of the system. We can generate enough savings, even at 35 percent, and frankly, the most practical figure would be about 50 percent savings.

If we stop playing around and misusing resources and actually do cleanup and were responsible and had accountability for the dollars, we'd cleanup a lot faster. The money would go into cleanups and we'd get the money out of litigation. That's why it's so vital to get rid of retroactive liability and get rid of joint and several liability.

If we can just do that—maybe you all three can comment on that. Have you looked at what do you think it would cost, total? Is there enough money, I believe, in our bill, there is enough money, through reform of the process, of existing revenues that we can be able to pay for retroactivity and joint and several reform.

Mr. SHANAHAN. At Heritage we've looked at several of the different proposals in terms of the financial flows and we think it could pay for itself. That was looked at by Price Waterhouse and Peat Marwick, as well, and verified, and that's part of the reason why we have—that lent quite a bit of credibility in our minds. However, we've not come to a firm conclusion as to whose numbers are absolutely correct.

So, part of the problem that we're looking at here is that there is a real fear here that those numbers may be optimistic and some other numbers which may be overly pessimistic; nevertheless, we'd better be safe than sorry.

So, possibly one approach would be to assume the numbers that quite frankly are the most extensive numbers—I mean the most effort in terms of crunching the numbers was in the one that shows that you can do it. But as a stopgap measure, as some sort of back-up, create some sort of mechanism whereby if there is a shortfall, then money, say green bonds or something, can be raised, or then you can have some sort of delay tactic or delay in terms of reimbursement.

Mr. BENTSEN. May I ask, by green bonds, are you talking—are these like REFCORP's and FICO's?

Mr. SHANAHAN. Debt financing.

Mr. BENTSEN. Would there be some allocation as to the repayment of those bonds? Like with REFCORP's and FICO's, there's allocation to the thrift and the banking industry. Would there be an allocation of the principal and interest cost on green bonds to certain industries?

Mr. SHANAHAN. I'm not sure if I understand your question.

Mr. BENTSEN. A REFCORP is a full faith and credit bond but basically the first lien goes through an assessment on banks and thrifts which are part of the BIF, the Bank Insurance Fund, and the Savings Association Insurance Fund, before the taxpayers. So, the industry really pays it but there's more than an implicit guarantee; there is a full faith and credit guarantee behind that in the event that there's a shortfall in those funds.

Is that the same way it would be set up or would those bonds be paid directly from appropriations from the general Treasury?

Mr. SHANAHAN. Those bonds would come from—what we know about the program, and everybody is in agreement that looks at the program, with remedy selection reforms we're going to be seeing savings on the back end.

So, what you would be paying for is out of the existing taxes which are on the business community, largely on the oil companies, about half that much or two-thirds of that much—over half a billion is on the oil companies alone. Some half to two-thirds of that is on the chemical companies. Then we have what we call CEIT, corporate environmental income tax.

You back-weight, in terms of those taxes, if you have a continuing tax stream coming in. Then those savings, you'd have a surplus in the program. That surplus—

Mr. BENTSEN. There would be a pledge of that and from the surplus on the Superfund tax—

Mr. SHANAHAN. That's right. So, what you have is a short-term blip in the program that may go over, and then you could pay for it from the savings as the program came down in costs and you had the big surplus. But I'm not necessarily pushing the green bonds idea versus a different financing mechanism. I don't think that necessarily it should be part of the initial package. Maybe it should be something which is an option if there turns out to be some sort of funding shortfall.

Mr. BENTSEN. I would say, and I know I'm way over my time, but I think what you say is, if I understand you correctly, is very important. If we were to go to this structure, there needs to be some sort of backstop in the event that there is a shortfall, that we don't come back and say, "Well, we didn't cut EPA enough this year" or "We didn't save enough money through efficiencies this year, so we're just not going to be able to do all these sites or we're not going to be able to do them that way."

We have to have some backstop, which is the analogy to the RTC because although the Government perhaps waited too long to close some thrifts and it cost a lot more money as a result, nonetheless at some point you had to step in and do it because they were completely insolvent.

Mr. ZELIFF. If I could——

Chair MEYERS. I believe Mr. Luther and Mr. Torkildsen have indicated that they do not have questions, so Mr. Zeliff, if we could conclude with a quick comment because I would like to move on to the final panel.

Mr. ZELIFF. I think what we're hearing here is that we really need to take care of a law that's flawed and we need to address full retroactivity and joint and several liability, and we have to figure out a way to do it.

One thing that would be a tremendous help for each of your organizations, if somehow we could take the Price Waterhouse data and people like that, and if you could go the next step in endorsing or not endorsing, the funding stream—or take a look at the funding stream in my bill. Just tell us you like it or you don't like it. I mean, 35 percent, 50 percent. If it's not that, give us a number.

But right now, CBO doesn't allow any credit for the amount of money that will come in as reforms, and this is crazy. We can't afford to let something go on over and over and forever and forever because we don't have the capability or the confidence to address the problem. We've got to figure out a way to get it done. It's wrong, and we just can't throw our hands up.

Here's a way to do it, and if you all would take that leadership, because you've got three very respected organizations, to work with what we already know, and either confirm it or not confirm it, then I think we can get our leadership to go to CBO with some outside credibility, which will force maybe just taking a look at what they need to be looking at anyway.

Then we can also look, as a back-up, a secondary trigger, whether it comes from user fees, not new taxes, on the people who basically contribute to the system as a trigger, or back to the general Treasury. But somehow we can't just put our heads in the sand and just say, "Hey, this problem isn't a problem." I mean, we're screwing people left and right and we're doing it in the most unAmerican fashion.

You're going to hear someone from New Hampshire that's had a horror story, and you'll hear others, and we don't have to go too far. We're all standing around here just saying, "It's OK." We've got to do something about it.

Chair MEYERS. Thank you very much.

Mr. ZELIFF. I don't get 5 more minutes?

Chair MEYERS. I can tell you have some strong feelings about this issue.

Mr. ZELIFF. I was just getting warmed up.

Chair MEYERS. I thank the panel very much for being with us. You've contributed to our understanding.

If we could ask our next panel to come to the table. Mr. John DeVinck, Kelvin Herstad, Edward Quinn, and David Norwine.

Thank you very much. I will turn on the lights at the beginning of your testimony and it will be for 5 minutes. Don't feel like you have to break off in the middle of a sentence or anything but when the red light comes on if you could conclude your testimony, then we will move on to our next witness.

Our first witness is John DeVinck from DeVinck Inc., of Superior, Wisconsin, and he is testifying on behalf of the National Automobile Dealers Association and on behalf of himself, too, I'm sure.

**TESTIMONY OF JOHN DE VINCK, DE VINCK INCORPORATED,
SUPERIOR, WISCONSIN, ON BEHALF OF THE NATIONAL
AUTOMOBILE DEALERS ASSOCIATION**

Mr. DEVINCK. Madam Chair and members of the Committee, my name is John DeVinck and I'm a Cadillac, Pontiac, Buick, and GMC Truck dealer from Superior, Wisconsin. My dealership was started by my father in 1938. I joined in 1964 and my brother in 1970. Currently we have 17 employees.

I am also a member of the National Automobile Dealers Association, a trade association representing over 20,000 franchised new car and truck dealers. They hold more than 30,000 separate franchises.

Chair MEYERS. Mr. DeVinck, I wonder if I could ask you to get a little closer to your microphone. You can just pull that whole thing toward you. They're voice-activated and we can hear you all right but sometimes in the back of the room it's not as clear.

Mr. DEVINCK. On behalf of our entire membership I would like to thank you for this opportunity to testify today on the impact of EPA's Superfund program on small businesses, particularly my dealership in Wisconsin.

In 1989, the U.S. Government and the State of Minnesota commenced a lawsuit against 15 major waste generators alleging violations of the Superfund law at the Arrowhead Refining Company site in Hermantown, Minnesota. Apparently, Arrowhead Refining Company re-refined used oil at the site from approximately 1941 to 1976.

In 1990 and 1991, these 15 alleged major generators sued over 250 smaller potentially responsible parties, commonly referred to as PRP's, asserting that they had arranged for treatment or disposal of used oil at the Arrowhead site. I was 1 of the 25 new car dealers from across northern Minnesota and northern Wisconsin that were named in this lawsuit.

This huge re-refinery processed waste oil from many industrial giants, including Reserve Mining, USX Corporation and Minnesota Power and Light. In fact, the city of Duluth and the State of Minnesota Department of Transportation were among the top five contributors, according to the EPA.

The six Wisconsin auto dealers, myself included, were identified as contributors by testimony of a former truck driver for Arrowhead. Based only on his recollection, he estimated the period of time during which he believed he had picked up used oil, as well as the amount he collected. Significantly, there are no supporting receipts or other documentation to substantiate his claims.

My dealership arranged to transport used oil to Arrowhead during a single 9-month period in 1976 when my regular used oil company would not cross a picket line at our dealership. I did not send used oil to Arrowhead during any other period of time and have witnesses and sworn affidavits attesting to this fact.

Regrettably, EPA and the PRP group who sued me refused to accept my supporting evidence and the testimony of the witnesses. With no jury or other fact-finding on EPA's part and no documentary records or evidence, they calculated the maximum amount of oil each dealership generated and assumed it was sent to Arrowhead during the 1944 through 1976 operating life, assessing liability based on that maximum amount.

The amount of my purported contribution was initially 31,855 gallons over the period 1960 to 1977. However, I submitted actual service invoices detailing the actual number of oil changes in a random sampling during 3-month periods in 1963, 1965, and 1976. The actual use of new oil in the three samples ranged from 105 to 119 gallons per month. Over the 9-month period, this amounts to approximately 1,000 gallons.

Simply put, EPA's assumption of 31,855 gallons was impossible based on my on-site storage capacity and the volume of oil handled by my dealership. This amount was substantially lowered later to 14,214 gallons, which still exceeded the storage capacity and the number of oil changes at my dealership.

I have now been involved in this process for over 5 years since being named as a PRP. As a result, my attorney's and consultant's fees will exceed an astounding \$100,000, while my liability at the site is \$78,000 based on my purported contribution.

My original financial liability was \$460,000, then lowered to \$230,000 when the alleged contribution was reduced, and finally set at \$70,000 plus accumulated interest.

As a small businessman who complied with Federal, State, and local regulations regarding my used oil, I'm utterly amazed at the legal entanglements I have endured and frustrated by the exorbitant liability I'm forced to assume. This is especially galling given that I sent my used oil to be recycled and relied on authorized used oil handlers.

In the vast majority of Superfund sites where auto dealers have been designated as PRP's, liability has centered around the management of used oil. In most instances, including my own experience, auto dealers demonstrated environmental responsibility by accepting used oil from consumers and do-it-yourselfers and sending it to licensed recycling and re-refining facilities. As a variation of the old adage goes, "No good deed goes unpunished."

The current strict, joint and several and retroactive liability system of Superfund is unduly harsh on small businesses. Under this liability scheme, any contributor to a site is potentially responsible

for the entire cost of cleaning a Superfund site, even if the volume of waste it contributed to the site was minimal.

Under retroactive liability, small businesses can be held liable for cleanups that resulted from alleged waste management activities occurring years and even decades ago. It need not be demonstrated that a small business was negligent or at fault to establish liability.

Often, as in my case, small business automobile dealers are named as PRP's to a site based solely on the sketchy memory of truck drivers who picked up used oil as long as 20 or 30 years ago. In other cases, dealers are identified as PRP's by EPA after a search through a local telephone book for those located in close proximity to the Superfund site.

To resolve this inequity, NADA supports the elimination of retroactive liability prior to January 1, 1987. The lack of records prior to this date creates clear injustices to small businesses. EPA and big business have the resources to force small businesses into inequitable settlements since we don't have the money or the documentation to prove that we didn't contribute to the large amounts of waste alleged.

In my case, the \$78,000 of cleanup liability I was assessed was an absolute travesty of justice. The problem was that I couldn't prove a negative. It was impossible to prove that I didn't contribute the huge amounts of used oil alleged.

Something is clearly wrong with a system that forces a small business to bear the burden of proof that it didn't contribute an alleged amount of waste, especially when there are no reliable records. As a result of a lack of records, retroactive liability should be eliminated for de minimis contributors. Furthermore, for those contributors who arranged for recycling, liability should be eliminated regardless of the date.

[Mr. DeVinck's statement may be found in the appendix.]

Chair MEYERS. We thank you very much, Mr. DeVinck, and I think the panel will have some questions for you.

Mr. Herstad is with United Truck Body Company of Duluth, Minnesota and he is testifying on behalf of himself and the National Federation of Independent Business

TESTIMONY OF KELVIN R. HERSTAD, UNITED TRUCK BODY COMPANY, DULUTH, MINNESOTA, ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. HERSTAD. Madam Chair, members of the Committee, I'd like to thank you personally and on behalf of the NFIB for allowing me to testify today.

Madam Chair, I'd like to say particularly thank you to you for the time and the effort you put in at the White House Conference on Small Business last June.

Chair MEYERS. Thank you.

Mr. HERSTAD. I was chair of the Minnesota delegation and we appreciated your interest and the information you came and got from us.

I would like to point out that one of the top five resolutions passed at the White House Conference on Small Business was under the category of environmental policy. While we seem to be

a monolith here, all parroting one story, there were roughly 1,800 small business people of diverse backgrounds, different viewpoints, and of those, 1,371 chose this as one of their top 50 resolutions. In fact, it received enough votes to make it one of the top five. One of the primary paragraphs was to eliminate retroactive and strict liability prior to January 1, 1987.

My submitted testimony today was prepared on Arrowhead Refinery. Mr. DeVinck and I are across the river from one another. He's in Superior, Wisconsin; I'm in Duluth, Minnesota. My business is located within a half a mile of Arrowhead Refinery.

A few weeks ago I was with the Federal judge, the senior Federal judge from Minnesota, Paul Magnuson, who had the overall responsibility of the litigation of this matter. It was the first opportunity I've had to mention to the judge that I had been involved with Arrowhead, and his comment was, "Oh, did I get you, too?" I said, "No, somehow my name was dropped." I don't know to this day exactly why.

However, the judge brought up a point that I'd like to point out to you people. They talk about a refinery, and I think that in your mind a refinery is something big and lit up and does all sorts of refining.

Well, Arrowhead Refinery is on a parcel of land that's probably 1,000 feet of frontage on a four-lane highway and 1,000 feet deep. That's the total land mass it covers. If you were to see it, and the judge, in order to be fair, when he was in Duluth one day decided to go look at the site, he said he drove by it four times before he stopped and asked somebody, "Where is it?" When they pointed it out to him he said, "My goodness. It was just a small tank farm," and it was, if you were to consider this particular unit of 4, 5, 2,500, or 5,000 gallon tanks.

What they did was collect motor oil. I have asked congresspeople who I've dealt with, "Do you know where your motor oil goes? Do you know where your grandfather's motor oil or your father's motor oil goes?" Well, I do because my father and my grandmother went to Arrowhead Refinery and had what they call a hot oil flush, and that was back in the 1940's and 1950's, and I did when I was a high school student.

So, it was generally accepted practice in our area to send your oil there or to go there and buy re-refined oil. What they did was heat it up to about 1,200 degrees, mix it with clay and then take that mixture and force it through a filter and what came out the other side was re-refined and what stayed behind was the residue that they then dumped on the back of the property and has now become the hazardous waste site.

Several things that I'd like to point out to the Committee, and I wish that Mr. LaFalce and Ms. Velázquez would be here because, one of the several things that happened at Arrowhead that I think could be corrected is this. Number one, it's one of the two sites in the State of Minnesota, and Congressman, I'd like to bring that to your attention—one of two—that the EPA kept to its own. The rest, they turned over to the Minnesota Pollution Control Agency. But in this particular case we were brought into this, and the Minnesota people, by both agencies.

The Minnesota Pollution Control Agency wanted to just monitor the site and contain it. The EPA said, "No, we want to clean it up." That's number one. I think you should make it clear that either EPA or whatever State agency you delegate to has the responsibility, but the duplicity costs us a lot of money and heartbreak.

Second, I believe that you've got to prioritize your sites as to what degree of risk there is. They'd just started cleaning up the site and it wasn't 3 days after they started cleaning it up that the cleanup plant blew up and a three-alarm fire went by my business. So, I, being curious, I went up over the hill to see what went on because there was a huge mushroom cloud over the site.

I thought that there was more contamination from the cleanup, with the explosion of that plant, than there had been over the last 30 years of it being in the site.

Finally, about 2 months ago a whole bunch of people descended on city hall because they were being affected health-wise from the cleanup. The burning of this residue was causing skin rashes, prickly skin, breathing difficulties, and so on, and they were burning at night. So, now, and that's what I want to point out, is that we have victims now that we never had if they'd just left it alone.

So, I really believe that we've got to have clearly defined definitions and that we can do the job. This is the final point that I have. When EPA first came in, they said it would take \$60 million to do the job. The major polluters formed a group called MASC, Minnesota Arrowhead Site Committee. MASC set out about to clean it up, hired their own people to evaluate the site, put in a water line, put in a sewer line. The water line was to service the houses around the site, even though there wasn't water pollution. They took the surface water and took it to the sanitary district via the sewage line. But their estimates came up to about \$25 million. The final agreement was about \$25 million, of which EPA contributed \$10 million. Then they billed back \$6 million for their costs, after all of this litigation.

So, it's my intention that you can save money. EPA said \$60 million; the people who were the major polluters said 25. It came out to that. There is money to save.

I really believe you're right, Representative, and Arrowhead Refinery is a good case in point. You could document the savings that could be done if it had been handled properly. Thank you very much.

[Mr. Herstad's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Herstad.

The next witness, Mr. Quinn, is chairman of the board of K.J. Quinn & Company Incorporated of Seabrook, New Hampshire. I believe he is a constituent of Mr. Zeff. We're glad to have him with us today.

Mr. ZELIFF. Thank you. I just am very encouraged and look to your testimony. I've been involved with Mr. Quinn as a respected businessman from New Hampshire, respected from all over the State. He's been a member of my New Hampshire Task Force on Superfund.

I've been through your firm. I know you have a family business since 1880 and your story, too, will be very heartwarming.

We really appreciate all of you coming down and I particularly welcome my constituent and look forward to your testimony.

TESTIMONY OF EDWARD L. QUINN, SR. CHAIRMAN OF THE BOARD, K. J. QUINN & COMPANY, SEABROOK, NEW HAMPSHIRE

Mr. QUINN. Thank you, Madam Chair and members of the Committee.

K. J. Quinn was first incorporated in 1880 and the company, at that time, made and sold shoe finishes to shoe factories throughout New England. Starting with my great-grandparents, William A. and Katherine Josephine, for whom the company is named, there have been five generations of the Quinn family involved with the business.

At present, I am chairman of the board and my brother Fred is president. My sons Leigh and David are also employed in the company.

Domestically, we employ some 60 wonderful, hard-working people operating out of facilities in New Hampshire, Massachusetts and Missouri.

We have always tried to be a good corporate citizen in environmental and other areas. For example, we created the position of director of safety and environmental affairs in the early 1970's and assigned this task to a senior chemist years before mandates by Federal or State government.

Our products are well known worldwide and enjoy a high reputation in the three product areas we serve, namely, shoe finishes, specialty water-based polyurethane coatings, adhesives and polymers, and zero VOC radiation curable coatings, which are dried by ultraviolet light. We do consider ourselves a leader in developing and commercializing environmentally friendly specialty chemical products.

During the years 1974 through 1977 our company contracted with Mottolo Waste Services for removal of solvent waste from our facility and, as we believed at the time, for transit to a lawful disposal site. In 1979, the State of New Hampshire environmental authorities discovered that Mottolo had dumped hazardous wastes of Quinn and a Massachusetts company named Lewis Chemical on an unauthorized owned by Mottolo in Raymond, New Hampshire.

To put this into historical context, it was not until late 1980 when EPA adopted the RCRA regulations for a hazardous waste manifest system and Congress passed the CERCLA Superfund law. As we all know, CERCLA has a retroactive effect on Quinn and other companies.

In 1983, EPA, later joined by the State of New Hampshire, commenced suit under Superfund against Quinn, Lewis Chemical and Mottolo. At that time, cleanup costs for the site were estimated at \$200,000 to \$300,000. Quinn requested its insurance company to begin cleanup. The insurer declined, electing instead to defend the Superfund suit, against our expressed wishes.

From 1983 till 1992 Quinn was involved with the Superfund suit, with site investigation and remedial design studies, and with our own suit against our insurance companies. We had to sue our in-

surer when it denied liability after exhaustion of 1 year's policy limits.

By 1993, over \$4 million in so-called transaction costs—that is, litigation and studies by technical consultants—were incurred without cleanup of the site. Because Mottolo and Lewis Chemical were deemed insolvent, Quinn and its insurers were identified as the sole source of funds for the cleanup, although some of the worst pollutants were contributed by Lewis.

In 1991, our independent consulting firm rendered its remedial study in which it estimated remediation costs consisting of \$670,000 for performance of the remediation plan and \$350,000 for design and oversight.

Quinn offered to perform the remediation but because we did not meet EPA's financial criteria, EPA undertook the remediation itself, with its chosen contractors.

In 1993, Quinn established a \$500,000 escrow fund for remediation costs. We have been informed that during 1994, active remediation was completed and apparently was successful. However, the costs of the cleanup and on-going monitoring expenses still have not been determined.

The existence of the Superfund liability, unknown in amount, has had a chilling effect on our ability to operate and finance our business and to engage in effective, long-range planning, investment and research. I believe that before we are free of the Mottolo affair, we will have spent in excess of \$5 million, mostly on legal fees, stifling, obviously, our growth.

May I take this occasion to thank you, Madam Chairman and Committee, for this opportunity to meet with you today and to tell our story. I certainly would welcome any questions you may have.

Chair MEYERS. Thank you very much, Mr. Quinn, for your testimony. I think it helps greatly with our understanding of what some of the problems are that are out there and how they can affect small businesses.

Our next witness is David Norwine of the Haward Corporation, North Arlington, New Jersey, and he is testifying on behalf of the National Association of Metal Finishers.

**TESTIMONY OF DAVID NORWINE, HAWARD CORPORATION,
NORTH ARLINGTON, NEW JERSEY, ON BEHALF OF THE NA-
TIONAL ASSOCIATION OF METAL FINISHERS**

Mr. NORWINE. Thank you. Good morning, Madam Chair, members of the Committee. I'm David Norwine and you just heard where I am and where I'm coming from.

My company is not only in the metal finishing business; we are a PRP in a Superfund site. Some of my experiences reflect those of others in the electroplating and surface finishing industry.

I would like to begin by reading to you a paragraph taken from an October 1985 letter from the Michigan Association of Metal Finishers to Representative John Dingell.

"As you know, the most controversial issue of a very controversial program is liability of waste generators. Even if the generator complies with all the regulatory requirements of the Resource Conservation and Recovery Act, including manifesting his waste and selecting permitted RCRA waste management facilities, he can still

be found liable if his waste is later identified at such a facility that becomes a Superfund site. Through no fault of his own, and after following all the rules, the generator can be found liable for part or all of the cleanup costs of the facility that has now gone sour. "Because environmental impairment insurance is generally unavailable at any price, the generator faces the daily risk of bankruptcy caused by events and persons over which he has no control. We think you will agree that this is fundamentally unfair and cannot be justified under any legal theory or principle of equity."

It is now October 1995, 10 years later, and we have the same issue at hand. The metal finishing industry has long been a proponent of eliminating Superfund's retroactive joint and several liability. This is why we were extremely pleased when Congressman Oxley introduced his Superfund reform principles paper in July.

We are deeply concerned, however, with the Oxley-Boehlert legislative proposal and Senator Smith's Superfund bill. While the current legislative proposals make enormous strides in establishing reason and flexibility in cleanup standards, they simply do not adequately address the liability quagmire.

To give a brief history, Superfund was enacted in 1980 to clean up the risk from pollution to human health and the environment posed by the Nation's worst dump sites. Plainly, Superfund has failed to achieve this goal, with only a fraction of these sites cleaned up.

The system is inefficient and grossly unfair. It pits Government against business, business against business. The result is years of unnecessary litigation, not cleanup.

Superfund is the only law in the Western Hemisphere that makes a person retroactively guilty for an act that was legal at the time. Under Superfund's retroactive joint and several liability, anyone who has the most tenuous connection to a Superfund site may be held liable for part or all of the cleanup, regardless of whether the waste disposal was legal at the time. Thousands of innocent businesses, municipalities and even organizations such as hospitals and school boards have been trapped in Superfund's liability net.

Of the 10,000 or so potentially responsible parties, small business makes up, by far, the largest sector. Potential liability results from having your waste or your industry's generic waste at a Superfund site. Once you're named as a PRP, the burden of proof shifts to you to prove that waste sent 20, 30, or 40 years ago to a site was not yours.

The draft Reform of Superfund Act of 1995 purports to get small business out of the Superfund liability net by eliminating liability at municipal codisposal sites. Certainly this proposal would help municipalities and small commercial operations, but it ignores the plight of many others. Small manufacturing industries such as ours typically send waste at the direction of Government to federally permitted disposal facilities. Through no fault of our own, we continue to be liable at these facilities when they become Superfund sites.

The metal finishing industry, in particular, has often opted for the more expensive but environmentally sound method of sending our wastes to metal recovery facilities. Carving out municipal landfills would simply shift the costs of liability to the small businesses

and continue to hurt the local economy. Most small businesses are not disposers at municipal sites, and the Oxley-Boehlert bill continues to discriminate against us.

The legislative drafters contend that small business will also be helped by expedited de minimis settlements. I can tell you from personal experience that the present system of de minimis settlements does not work due to the tyranny of the majority rule.

Haward Corporation contributed .0087 percent to the Chemical Control Superfund site. After 15 years and \$15,000, Haward still has not fully resolved its liability at this site, and the remediation for the protection of human health, the real purpose of Superfund, has not been completed.

A de minimis settlement at a multiparty site with a multimillion dollar cleanup is likely to be hundreds of thousands of dollars, before the addition of premium, to preclude further costs. These are astronomical figures for most small companies that could easily put them out of business.

Simply receiving a PRP notice creates financial uncertainty that can ruin banking relationships. Banks have always been skeptical of small business loans. The threat of Superfund liability eliminates those relationships, as banks assume that the economic viability of a company would be compromised.

Additionally, merely being listed as a PRP will cause many small vendors like my company to be dropped from the suppliers list of many large manufacturers. This stifles a small business's ability to grow and contribute to the local economy. Small business owners are even wary of transferring ownership of the business to the next generation, as their liability will transfer.

De minimis settlements still capture small companies in the Superfund liability net with all the attendant problems. Lawyers and consultants must be hired because, under the current legislative proposal, the burden of proof still falls on small companies to refute allegations of liability and to prove or disprove their allocation share. We must prove our de minimis status, which is difficult with little data on disposal practices from 20, 30, or 40 years go.

Further, the Oxley-Boehlert plan fails to adequately address the evidentiary standards under today's system that discriminates against small business. Unsubstantiated information, such as the recollections of truck drivers, should be excluded. How can we base a \$100,000 liability on the 20-year-old remembrances of a driver?

The current legislative proposal establishes an allocation system to apportion shares of liability among potentially responsible parties. The metal finishing industry has serious concerns about any allocation process for pre-1987 disposal. Prior to the full implementation of the hazardous waste manifest in 1986 under RCRA, minimal records exist to show what waste, by what quantity and what type, went to disposal facilities. Without such records, small companies are at a disadvantage in any liability allocation process.

In reality, there can be no fair share of liability for parties who acted lawfully at all times. Haward Corporation did everything right. We took our waste material to a site that had been inspected, licensed, permitted, advertised and recommended to us by State and Federal Governments, but when the time came to accept responsibility, the agencies were nowhere to be found. I want to

know when is the Federal Government going to stand up and face their own responsibilities?

A far more sensible approach would be to repeal retroactive liability and pay for cleanup through the Superfund's existing trust fund, which is financed by taxes on chemical and petroleum companies and a broad-based business tax. This approach would enable EPA to move expeditiously to the job of cleaning up the worst hazardous waste sites, and not wait until the legal battles have been fought.

In New Jersey during the early 1940's, a small company making instrument dials for aircraft discharged small amounts of mercury into a stream. An effort has now been made to attach the assets of the grandchildren of the owners of that facility to pay for the cleanup.

The metal finishing industry appreciates the fact that you have chosen small business and their Superfund involvement as an issue for this hearing and your deliberations. This industry joins many other interests, both large and small, in calling for meaningful reform that addresses both the economic costs and the environmental costs resulting from delayed cleanups.

I thank the members of this Committee for the opportunity to comment.

Chair MEYERS. Thank you very much. I just want to thank you all so much for coming in. I think it certainly has brought home to me that we need to bring more fairness and justice to this process.

If businesses do what is legal, if they send their waste to a federally licensed, permitted, inspected site, then those small businesses should be able to have confidence that they will not be liable for many, many years to come.

I do know that there are two bills pending. You have expressed some concern with the Oxley bill. I would presume, then, that there is support for the Zelif bill and probably for the administration bill, which is a good bill as far as it goes but does not address the problems of joint and several or retroactive liability.

At any rate, I appreciate very much your coming in today, and I'll ask Mr. Zelif if he has questions.

Mr. ZELIFF. I appreciate very much your having this hearing. I think it's very, very important, particularly as we're now getting ready to do reform of Superfund. I think it's very timely.

I want to echo your comments to the panel. Every single one of these horror stories is nothing but that—a horror story. I'll ask the question, do you know of any law that you have to live by in the Federal Government that's worse than Superfund?

Mr. NORWINE. No.

Mr. ZELIFF. It's a loud "no," right?

Mr. NORWINE. Completely unfair.

Mr. HERSTAD. I'd rather have the IRS come in than the Superfund get involved.

Mr. ZELIFF. You've got a fair shot with the IRS, maybe, right, in comparison. I think unless you're a PRP and unless you're involved with Superfund, you just have no idea what's going on with this flawed law. When I got involved in it, and I've gone to Mr. Quinn's facility—it's a beautiful company, top drawer and very committed—

I didn't hear one story here with anybody saying that they want to get out of their liability. The problem is how do we go about it? In each case there's voluntary involvement in terms of wanting to clean it up, but how do we get about doing that?

When Government is not here to help and it becomes an enemy, then something's wrong with the Government's approach, I think. I listened to the testimony from the Justice Department. I mean, it's like being in another world. To see her just talk about, "Well, everything is just fine and all we have to do is just trust the Government to do a better job than they've done since 1980."

I mean, I don't see that changing. I guess we're kind of preaching to the choir here but what is your reaction? You heard her testimony. What is your reaction to her testimony? I mean, they support the administration's bill which is a big improvement but it doesn't address retroactive and joint and several liability, which is the major problem that's driving the problems with Superfund.

So, if we don't address that and the Oxley bill doesn't address it, the Smith bill doesn't address it, then we're going to have to come back and revisit this. Does that make sense? Maybe you can comment.

What's your reaction to her testimony?

Mr. QUINN. Well, I agree with your comments that it doesn't fix the system, the thing that's wrong. We have to go all the way and not do a band-aid job. We have to really repair the system. Retroactive and joint and several are completely unfair and can be financed as you've suggested and I think others here today have also proposed some ideas that do show that it can be done.

We've had systems or other involvements where we literally had no contamination at all but we were even spending legal fees just to defend ourselves to prove what EPA had already let us out us, that we were innocent in a particular landfill site.

The terrible waste going into the legal system instead of being used to do the cleanup is really the major issue. We ought to get on with cleaning up the site, work cooperatively together, and not have an adversarial role. I think that's really a major thing.

Mr. ZELIFF. So, we have people willing to do what they are responsible for.

Mr. QUINN. Absolutely.

Mr. HERSTAD. There are some parts of EPA that have worked. Not when it comes to Superfund sites, but one of the examples that I know of best is underground tanks. We have probably cleaned up 90 to 95 percent of all the underground tanks that didn't meet the new standards over the last 10 years, and a good share of those tanks had been reimbursed by Superfund funds, based upon formulas that were developed.

It was a cooperative effort. It was not an adversarial effort. EPA had a commitment, based upon need, to reimburse people for replacement of tanks, and it was done.

Mr. ZELIFF. That was a cooperative effort with the States.

Mr. HERSTAD. That's right, absolutely. It was a shared cost, right up front. It's worked. But why that same philosophy was not carried through to Superfund sites, I don't know.

Mr. ZELIFF. That's a good point. It's a good example, great example. In New Hampshire, that works out well.

Mr. HERSTAD. That's right.

Mr. ZELIFF. If you fully reported those underground tanks and you have a problem, it goes through a trust fund, which is basically supervised by the State of New Hampshire, and you pay liability, I believe, up to \$5,000 and then, beyond that, the trust fund picks it up. Anybody that has a problem with that is willing to do that.

Mr. HERSTAD. It worked, and we've got the tanks cleaned up.

Mr. ZELIFF. Right.

Mr. HERSTAD. Yet the Superfund sites, 18 percent. It's taken, since we first received our citation, it's almost 15 years and they've just turned the first soil this year.

Mr. ZELIFF. Any additional comment?

Chair MEYERS. We thank you all.

Mr. ZELIFF. There's one more.

Chair MEYERS. Yes, Mr. Norwine.

Mr. NORWINE. You almost asked the question that was asked of a previous panel about recovering costs. One of the things that was talked about here is how to go on paying for doing it the way we've always done it. That's the center core of the problem.

We shouldn't be doing it the way it's always been done. EPA presently calls for perfection at a site, and this is something that is damned expensive.

When we talk about infant-ingestible dirt, they now say it must be 8 feet deep. What this really means, when you carry this thing out, is if we put a million babies on the ground, every one of them digs a hole 8 feet deep and lies in the bottom of that hole eating dirt for 70 years, one of them will get a cancer. The ridiculousness of that idea is what's wrong with the whole system.

We've read in the papers—I guess we've all read in the papers opinions that several Federal agencies have run amuck. Well, I know another agency that has run amuck and it's the U.S. Environmental Protection Agency, and the Superfund law is one of the examples of that.

Mr. ZELIFF. Thank you. Could I just add one quick—for the record?

Chair MEYERS. Yes. I think we have some more questions, so one more comment.

Mr. ZELIFF. I'll just make a quick comment for the record. On the funding scheme, we take in \$1.5 billion annually in direct taxes. We take in, from the general fund, \$250 million. We round that off at \$1.8 billion. We believe that full repeal would cost us somewhere in the vicinity of \$2.2 billion, could go a little bit more.

With reform of the process that's in our bill and would, at a 35 percent level, which is very conservative, would bring in a half a billion dollars more, \$500 million, to be added to the income stream. The problem that we have is convincing CBO that by reforming the system, that that money should be included in the income stream in order to be used.

I mean, it doesn't take a rocket scientist to figure it out. Somehow we've got to figure out—get Government off the dime and wake up and do it right.

I'd like to, if I can, include this in the record.

Chair MEYERS. Without objection.

[The Chart, "Funding Superfund Reform Without a Tax Increase" may be found in the appendix.]

Chair MEYERS. Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

I heard an analogy that I think expresses the problem that many people see here. The judge fines a driver going through a stop sign last July. The driver responds, "But Judge, there wasn't even a stop sign there until last October," and the judge says, "Never mind, there's a stop sign there now and you're guilty."

Everyone recognizes that that's clearly insane, but that is, in effect, exactly what's happening here. Certainly we need to cleanup the joint and several and we need to cleanup the retroactivity problem.

Mr. Norwine mentioned what I think is a major problem that we haven't even been talking about here. We shouldn't be looking for money to do things we don't need to do. What we need to do is, in addition to cleaning up the joint and several liability and the retroactive thing, we need to have some reasonable cleanup standards. Every square foot of ground in this country doesn't have to be clean enough so that it could be eaten by a nursery school child. That's ridiculous.

Some of them, if they're now contained, and I heard one of our witnesses indicate the percentage of sites that are contained, not going anywhere, going to get better through time, and all we need to do is to, in effect, use those for purposes appropriate to their present level of contamination or usefulness, and they will get better in time. We don't need to be looking for money to do things that we don't need to do.

I'm concerned that all of this legislation is simply accepting the fact that we've got to clean these things up to the zero pollution standard, whatever they call the thing, and I don't think that this is sane, I don't think it's necessary, and I don't think that it's good science and I don't think that the cost is anywhere near justified by the benefit.

We now have in place law that says we're not going to do things that are just plain dumb. Like when the old barber said, "you shouldn't do something when the juice ain't worth the squeezing." Well, in a whole lot of this environmental cleanup, the juice ain't worth the squeezing.

I quote, and I don't know whether your legislation, Mr. Zeliff, includes this, that we——

Mr. ZELIFF. Juice? Yes, it does.

Mr. BARTLETT. Well, you don't need to find any more money if we're doing something sane here because I think there's more than enough money to do reasonable, rational things here.

Mr. ZELIFF. Our bill does address that.

Mr. BARTLETT. Does address that.

Thank you very much and that's all I have, Madam Chairman.

Mr. Souder.

Mr. SOUDER. I'm sorry I missed the testimony. I just quickly read all of your testimony while I was listening out of the other ear, and went through the first panel's, as well, and basically agree. I mean, I've been hearing from companies in my district. We have numerous companies in northeast Indiana that are similar to yours and

who have been dragged in. Very small businesses all of a sudden have big fees because they showed up in some file somewhere.

I want to make it clear, too, that while retroactive liability is not fair on most things, if there are cases where somebody has not told the truth about what they were going through, if sometimes, as a businessman myself, we look at something and knowing there's some liability, we're likely to be a little more careful. To some degree, if a business has some idea that their stuff isn't safe and there isn't a law, there might be some responsibility.

In other words, I'm not going to say there's never a retroactivity question because we ought to be acting as businessmen concerned about our society some, too.

The problems with these, however, are not caused by the majority of the people. They're caused by the few people who are abusing it and often they go bankrupt and leave the rest of us holding the bag.

That's really what we're trying to deal with here and I appreciate you coming in to Washington. I appreciate Mr. Zeliff's efforts to try to come up with legislation, and all this helps those of us who are trying to address it and see the different problems.

Clearly we have to, at the very least, change, one, the scientific standards in this country, which have gotten totally out of whack in OSHA and EPA and a lot of these different organizations and, second, we have to get it off the small businesses, who are getting huge fines merely because they can find them. Otherwise you know what we're all going to learn? Don't keep any records. Because, in fact, those who are careful are getting burned more than those who deliberately hid and ran away, and the rest of us have to pick that up, and it's not very much of an incentive to be a responsible businessman if they continue to work in this way.

Thank you once again for coming in to Washington. Sometimes it gets frustrating, but it all adds up and helps in the process.

Chair MEYERS. Thank you, Mr. Souder. I would say, in relation to your comment about the records, I think that for the most part probably is true, although Mr. DeVinck had the situation where he had contributed waste for a 9-month period and was charged for a 10-year period. I imagine he wished he could have proved differently with absolute records.

Mr. DEVINCK. I did.

Chair MEYERS. But I am really quite appalled to understand that they were using the testimony of a truck driver from 20 years ago in order to document who was liable and who was not in your particular case.

So, we have learned from all of you and thank you very much for being with us today. Unless there are further comments, this hearing is adjourned.

[Whereupon, at 12:44 p.m., the hearing was adjourned, subject to the call of the chair.]

APPENDIX

STATEMENT OF FLOYD H. FLAKE BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS OCTOBER 19, 1995

I thank you Chairwoman Meyers for convening this important hearing on the Superfund program. In our attempt today to gain an understanding as to why this program is often deemed the most praised and criticized environmental law, it is imperative that we examine its liability and litigation issues. I also congratulate the Chairwoman and her staff on the efforts to uncover the potential effect that these liability and litigation issues have upon our nation's small businesses. The importance of cleaning up hazardous waste sites and identifying those who contributed to these environmental catastrophes is often expensive and time-consuming. Given this fact, it is important that we examine issues of retroactive and municipal liability as well as joint and proportional liability. While we all can agree that it is necessary to reform Superfund, we have to insure that neither the business community, nor the American taxpayer assumes an undue burden. I hope, in our efforts to assign responsibility for cleaning up these dangerous sites, we do not lose sight of the fact that many communities are currently living with these hazardous materials in their midst. As we labor over who is to pay for hazardous waste site cleanup, these sites are causing additional irreparable harm to many individuals who live near these sites. So with that, Chairwoman Meyers, I look forward to hearing how we can best assign responsibility for the clean up of the many American communities which live with environmental hazards daily.

STATEMENT OF THE HONORABLE DON MANZULLO
BEFORE THE HOUSE SMALL BUSINESS COMMITTEE
"EFFECTS OF SUPERFUND LIABILITY ON
SMALL BUSINESS"

October 19, 1995 10:00 AM in Room 2359 RHOB

Madam Chair, I commend you for holding this hearing today on the need to reform Superfund. It's absolutely insane that after spending \$20 billion over the last 15 years on Superfund, only 83 out of 37,000 identified sites have been clean-up and removed from national priority list. This has been a lawyers bonanza with little impact on cleaning up the environment.

What's missing from the usual arguments about Superfund is the negative impact on small businesses. This issue was so important that Superfund reform ranked fifth out of all the hundreds of recommendations submitted to the White House Conference on Small Business.

More than 30,000 small and medium-sized businesses, hospitals, cities, and others have been cited as potentially responsible parties (PRP's) to clean up these Superfund sites. The average cost for clean up reaches \$32 million. Fines can reach up to \$25,000 per day for failure to comply with required remediation orders by the Environmental Protection Agency (EPA). These fines can increase to \$75,000 per day for ensuing violations. You can easily see, Madam Chair, that small businesses could easily become bankrupt for problems that many did not originally cause.

I am enclosing as an exhibit an article that appeared in this week's edition of Newsweek (October 23, 1995). It details the gross unfairness of the mechanics of the Superfund program, showing how an 84 year old widow in Eugene, Oregon is responsible for her dry cleaning tenant's waste disposal dating back to between 1952 and 1972. The dry cleaner did nothing illegal. Now the

widow has been told she has to pay \$200,000 for a clean up while her building is "worth" only \$70,000.

Superfund reform is especially important for Rockford, Illinois. That city is a classic example of the "brownfield" problem where urban renewal in the heart of the city is placed on hold because of fear of Superfund liability. I know that this is a high priority for Rockford Mayor Charles Box to see some resolution to this problem.

In addition, some businesses that decided to remain in the downtown center have lost considerable value simply because of their location. They are fearful to move or sell their small business because all of their hard work could be lost just because of an unrelated problem that they had nothing to do with.

If we are concerned about inner city renewal and a return of economic vitality to our nation's cities, then Superfund reform is a key component of that equation. Thank you, Madam Chair, for holding this timely hearing today.

MY TURN

TAKEN TO THE CLEANERS

My elderly mother may lose her security because of changing community standards

BY CAROLYN SCOTT KORTGE

IN JUNE, A FEW DAYS AFTER HER 84TH BIRTHDAY, MY MOTHER received a certified letter from the State of Oregon. It wasn't a birthday greeting, but it is likely to change the way she celebrates every birthday from now on. It almost certainly will change her way of life. My mother lives now, as she has for many years, alone and independently in a house on the edge of a small Willamette Valley town. Every spring she plants a garden. Every Saturday from spring until fall she circles her yard clipping flowers to fill two bouquets for her church. She moved to this corner in 1952, two years after my father died.

My mother was 38 when my father slipped from a construction scaffold in an accidental fall. I was 7, my brother 5. After his discharge from wartime service in the shipyards of Bremerton, Wash., my father had barely established himself as an electrician. He left \$2,100 in death benefits. My mother updated her teaching credentials and found work in a rural school. Then, with \$1,500 in hand, she went to the local bank. She wanted a loan to construct a small commercial building on the downtown lot where we then lived. The building, she said, would be her security. It would offer what my father now couldn't—a source of support in her old age.

In 1952, the building opened its doors. On one side of its 40-foot storefront, The Little Charm Shop displayed children's clothing. NuWay Cleaners filled the other side. The two stores served Main Street shoppers for 25 years until the operators of the cleaners retired. A flower shop moved into the space. By that time, the hardships imposed by the building were over. The days of pinching pennies and relying on grocery-store credit to make payments had ended. After more than 20 years of teaching seventh graders in town schools, my mother was looking forward to retirement. The future looked as rosy to her as the flowers in her tenant's cooler.

All that has changed. The building that once represented security produced a menace with the potential to bankrupt her. The discovery of contamination in city-park well water triggered groundwater tests in the area. Waste products once discarded by dry cleaners were identified as a likely source of contamination. Although a dry cleaner hasn't operated for 20 years on my mother's property, chemicals remain in the soil. Mother knew nothing of this hazard until a letter came from the Oregon Department of Environmental Quality. It said she should decide if she would oversee further testing and cleanup herself or if she would let the state handle it. In either case, my mother would pay the costs.

Property-tax appraisals set the current value of her building at just under \$70,000. State employees and independent environmental consultants warn us that \$200,000 is a conservative estimate for cleanup costs. My mother's entire estate, including the building, her home and her savings, wouldn't cover the bill. At 84, she has enough

money to live long and comfortably. She has enough savings to preserve her independence. She does not have enough money to bear the enormous costs of changing community standards.

The dry cleaner that operated in her building 40 years ago disposed of chemicals the same way as others did. Water samples show similar chemicals at other dry-cleaner locations in town. None of these businesses was operating in a negligent manner. They followed standards accepted by the community in 1952. Now we are learning that we must live more carefully if we are to survive in a world that is safe and clean.

My question is: who should be responsible for costs imposed by changing community standards? Does liability stop with the easiest target? Or should the costs be shared by taxpayers and legislators who made the changes? This question, I'm told, worries senators and judges. It's not easily answered. The questions are ethical, political and economic. The impact is profoundly human.

While the politicians debate, my mother has been gripped by uncertainty and fear. We were advised that she could try to spread the liability. She could take action against the dry cleaner, seek payment from companies that supplied his chemicals. She



could attempt to identify insurers of the building before environmental hazards were written out of liability coverage. This is possible, we are told, but she must deal with it. She must pay the attorneys. She must hire the experts. The cost of spreading the burden is her burden. This is because state and federal law make her, the property owner, fully responsible. Even if she succeeded in distributing the burden of environmental cleanup among others, the effort could easily consume her savings.

Reluctantly, my mother humbled herself this summer. She bundled up tax records, savings statements and retirement-fund reports and applied to the State of Oregon for hardship status. The appeal brought mercy, but not justice. It saved her home and her savings, but not her self-confidence. It appears she will lose the building that has been a symbol of security and prudent investment. The state has reserved the right to take the building in payment for cleanup costs. The law still holds her culpable.

My mother is on her own again. She's alone at the front of an issue that promises to stretch across the nation, touching thousands of small businesses. Dry cleaners, mechanics, print shops—all will face the same questions eventually. Who will pay? Who will be responsible for cleaning up messes made before we knew better?

These costs go beyond the loss of a rental-income building. Instead of facing the remainder of her life confident that she can provide for herself and contribute to her community, my mother is stocking up on shoes and underwear—fearful she won't be able to afford them in the future.

The crippling realization that she could at any time be stripped of the means to support herself financially seems to have invaded her very cells. Her legs ache. Some days now, she leans on a chrome walker, unable to carry her own weight for the first time in her adult life. Surely this was not what we intended when we assessed the environmental transgressions of our past and set out to clean up the errors we made as a society on our way to the American Dream.

KORTGE, a freelance writer, lives in Eugene, Ore.

OPENING STATEMENT
OF
HON. JAN MEYERS (R-KS)
CHAIR
COMMITTEE ON SMALL BUSINESS

"Effects of Superfund Liability on Small Business"

October 19, 1995

The subject of today's hearing -- Superfund reform -- is an issue of great importance to this nation's small businesses. At the recently concluded White House Conference on Small Business, meaningful reform of Superfund, particularly the liability system, ranked as the Number 5 recommendation of the Conference participants.

Superfund, which was created with the enactment of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980, has long been considered a program in need of major reforms. Since its inception 15 years ago, Superfund has been the target of much criticism. For many who are familiar with the Superfund liability system, the program appears to be more of a "cash cow" for environmental lawyers than an efficient mechanism for cleaning up hazardous waste sites. Hopefully we can address some of these concerns today.

Our witnesses for today's hearing include Assistant Attorney General Schiffer, who as head of the Environmental and Natural Resources Division of the U.S. Department of Justice is charged with the enforcement of our federal environmental laws. Joining

her on our first panel are three noted experts on the issues surrounding Superfund. From Citizens for a Sound Economy we have with us today Susan Eckerly, Director of Regulatory Policy. From the Small Business Survival Committee we have Chief Economist Raymond Keating. Our final witness on Panel One will be John Shanahan, a Policy Analyst specializing in environmental issues at The Heritage Foundation.

Our second panel today is comprised of four small businessmen who have had the great displeasure of being caught-up in Superfund litigation. These witnesses will give us a first-hand account of their experiences with the Superfund liability system and their insights for meaningful reform. Messrs. John DeVinck and Kelvin Herstad are here today from the upper Midwest, and from their testimony I understand that they have experiences with the same Superfund site in northern Minnesota. Mr. Quinn is here today from New Hampshire and has served on Congressman Zeliff's New Hampshire Superfund Task Force. Our final witness today is David Norwine from New Jersey.

Before we start, I want to briefly recognize all the hard work one of our Committee Members, Bill Zeliff, has done in this area of Superfund reform. The issues involved in Superfund reform are very difficult and can be highly contentious, and I applaud Congressman Zeliff for his efforts to assist small business with meaningful reform.

Committee on Small Business The House of Representatives

Opening Remarks of The Honorable Glenn Poshard

October 19, 1995

Thank you, Chairwoman Meyers, for holding today's hearing on the effects current Superfund legislation has had on our nation's small business communities. As a member of both the Small Business Committee and the Public Works and Infrastructure Committee, I have a vested interest in the impact this legislation has had on small business owners' ability to continue to operate while trying to responsibly cleanup a contaminated waste site.

I support the fundamental mission of Superfund legislation, because I believe it is important to ensure that America's natural resources are kept healthy and safe. However, the liability and legal problems that have continued to mount as a result of Superfund efforts have forced Congress to begin the process of reforming this legislation. While our goal in enacting Superfund was to cleanup our environment, it has resulted in our courtrooms being congested with Superfund disputes while the poisonous contaminants we wanted to cleanup continue to sit unabated.

Thank you again, Madam Chairwoman, for holding this important hearing and addressing this issue that in many instances impacts small businesses. I am hopeful that after listening to today's testimony, members of this Committee will recognize it has become necessary to fix the flaws in our current Superfund legislation. While we all advocate responsibility in cleaning up our nation's Superfund sites, we should come together and advocate doing it in a reasonable and fair manner. I hope the dialogue we have today will help us begin to find some resolution to this important issue.

**REMARKS OF HON. BILL ZELIFF
HOUSE COMMITTEE
ON SMALL BUSINESS
“EFFECTS OF SUPERFUND LIABILITY
ON SMALL BUSINESS”
October 19, 1995**

I thank the Chair and commend you for holding these very important hearings on the Superfund program. As you know, I have a very strong interest in massive reform of this program, and I look forward to the hearings over the next week or so.

I have been involved with Superfund since I was first elected in 1990. Soon after being elected, I learned that I had 14 National Priority

List sites in my district -- and began walking those sites.

After walking just a few sites, it became clear to me that this program was not working. Small towns were putting off building new schools or hiring new teachers, and small businesses couldn't find the capital to expand and create jobs.

I then assembled a Task Force of about 35 members to study these problems, and come up with some suggestions as to how to get the Superfund program back on track. We came up with a series of recommendations which I then turned into H.R. 4161, the "Comprehensive

Superfund Improvement Act," introduced in the 103rd Congress.

While my bill addressed many different areas, the most important part of my bill addressed liability. Specifically, the elimination of retroactive liability and the replacement of joint and several with a binding fair share allocation system.

This year I have introduced H.R. 2256. This is significant legislation because it presents a map of what I believe is the best way to make Superfund work in the fairest and quickest way possible. My legislation will repeal Superfund's

unfair, unjust, and un-American retroactive and joint and several liability system. They will be replaced with a binding proportional liability allocation system that will only hold people responsible for what they contributed to a superfund site. Most importantly, my legislation lays out a mechanism that I am convinced can pay for such a repeal and see these sites come out of the courtroom and get cleaned up now.

If we look briefly at the 15-year history of this program, we will see that Superfund was created in 1980 with a trust fund of \$1.6 billion to clean up what was then assumed to be a few dozen waste sites. Congress increased the financing to

\$10.2 billion in 1986, then to \$15.2 billion in 1990. Bear in mind that these numbers are only the FEDERAL contribution. Small businesses and other private parties are stuck with the brunt of these costs.

Despite these billions of dollars of taxpayers' money being spent for such a laudable cause, we now see that a mere 18% of Superfund sites have been cleaned up in that same time period. This raises the obvious question of whether or not we are getting our money's worth. These facts, combined with a GAO report released just yesterday which says that at the most only one-third of all Superfund sites pose an actual risk to

human health, make it is obvious to me that we are not getting our money's worth.

There is one group out there, however, that would argue that we are getting our money's worth. It is the armies of lawyers who spend years in court arguing every possible detail of Superfund liability. So when we look carefully at why this Congress has spent billions and billions of dollars and seen a minuscule amount of action, there should be no question as to the culprit: it is the current program's un-American and un-just liability system.

It is clear that it is the liability system of Superfund which has brought this program to its knees. We can make all the reforms and changes we want to the Superfund program, but I assure my colleagues that if we do not make major changes to the liability system, we will all be back here again having the same conversations in just a few more years.

I have advocated the repeal of retroactive and joint and several liability for several years now, and in fact I offered amendments to last year's bill to repeal those liability standards. There was a large amount of support last year for my idea, but this year, we are seeing even more support. It is

yet another burst of common sense that took over this Congress last November.

Retroactive liability permeates every aspect of the Superfund from driving cost recoveries and litigation to remedial and cleanup decisions. It is unfair, and it is un-American to hold people responsible for actions which were completely legal at the time.

The end result is a broken-down law that has cleaned up very little in its long 15-year history -- all because these sites sit vacant and abandoned while everyone is in court paying lawyers millions and millions of dollars arguing over who

did what. This is not the environment getting cleaned up, it is the lawyers cleaning up.

The bottom line for any Superfund reform is to get the money away from the lawyers and into cleaning up these sites. The only REAL way to do that is to eliminate retroactive liability.

In closing, let me be clear on one last point. There is no compromising on the issue of fundamental liability reform. The only ABSOLUTE way to finally fix the Superfund program, get the remaining sites cleaned up, and move on is to fully repeal the current liability standards and free the system to work free of

courtroom standoffs and eager environmental lawyers. The people of the United States deserve nothing less -- they deserve a clean environment and they deserve to be assured that their hard-earned tax dollars are going to clean up these sites rather than pay these endless armies of lawyers.

I will stop there, Madame. Chairwoman, in the interest of hearing today's testimony.

Thank you once again.

TESTIMONY
OF
JOHN B. DE VINCK
DE VINCK's, INC.
SUPERIOR, WISCONSIN

ON BEHALF OF THE
NATIONAL AUTOMOBILE DEALERS ASSOCIATION

BEFORE THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

OCTOBER 19, 1995

National Automobile Dealers Association
412 First Street, SE
Washington, DC 20003
(202) 547-5500

Madame Chair and Members of the Committee:

My name is John DeVinck and I am a Cadillac, Pontiac, Buick and GMC Truck dealer from Superior, Wisconsin. My dealership was started by my father in 1938. I joined in 1964 and my brother in 1970. Currently, we have 17 employees. I am also a member of the National Automobile Dealers Association (NADA), a national trade association representing over 20,000 franchised new car and truck dealers holding more than 35,000 separate franchises. The primary business of NADA members is the retail sale of new and used motor vehicles, both foreign and domestically produced. Dealers are also engaged in automobile service, repair and parts sales. On behalf of our entire membership, I would like to thank you for this opportunity to testify today on the impact of EPA's Superfund program on small businesses, particularly my dealership in Wisconsin.

In 1989, the U.S. Government and the State of Minnesota commenced a lawsuit against 15 major waste generators alleging violations of the Superfund law at the Arrowhead Refining Company site in Hermantown, Minnesota. Apparently, the Arrowhead Refining Company re-refined used oil at the site from approximately 1941 to 1976. In 1990 and 1991, these 15 alleged major generators sued over 250 smaller potentially responsible parties, commonly referred to as PRPs, asserting that they arranged for treatment or disposal of used oil at the Arrowhead site. I was one of the 25 new car and truck dealers across northern Minnesota and northern Wisconsin that were named in the suit.

This huge re-refinery processed waste oil from many industrial giants, including Reserve Mining, USX Corporation and Minnesota Power & Light. In fact, the City of Duluth and the State of

Minnesota Department of Transportation were among the top five contributors according to EPA. The six Wisconsin auto dealers, myself included, were identified as contributors by testimony of a former truck driver for Arrowhead. Based only on his recollection, he estimated the period of time during which he believed he had picked-up used oil as well as the amount he collected. Significantly, there are no supporting receipts or other documentation to substantiate his claims.

My dealership arranged to transport used oil to Arrowhead during a single nine-month period in 1976 when my regular used oil company would not cross a union picket line at our dealership. I did not send used oil to Arrowhead during any other period of time, and have witnesses and sworn affidavits attesting to that fact. Regrettably, EPA and the PRP group who sued me refused to accept my supporting evidence and the testimony of witnesses. With no jury or other fact finding on EPA's part and no documentary records or evidence, they calculated the maximum amount of oil each dealership generated and assumed it was sent to Arrowhead during its 1944-76 operating life, assessing liability based on that maximum amount.

The amount of my purported contribution was initially 31,855 gallons over the period of 1960 to 1976. However, I submitted actual service invoices detailing the actual number of oil changes in a random sampling during three-month periods in 1963, 1965 and 1976. The actual use of new oil in the three samples ranged from 105 to 119 gallons per month. Over the nine-month period, this amounts to approximately 1000 gallons total. Simply put, EPA's assumption of 31,855 gallons was impossible based on my on-site storage capacity and the volume of oil handled by my dealership over that time period. This amount was subsequently lowered to 14,214 gallons, which still

exceeded the storage capacity and number of oil changes at my dealership. I have now been involved in this process for over five years since being named as a PRP. As a result, my attorneys' and consultants' fees will exceed an astounding \$100,000, while my liability at the site is \$78,000, based on my purported contribution. My original financial liability was set at \$460,000, then lowered to \$230,000 when the alleged contribution was reduced, and finally set at \$70,000 plus interest.

As a small businessman who complied with all federal, state and local regulations regarding my used oil, I am utterly amazed at the legal entanglements I have endured and frustrated by the exorbitant liability I am being forced to assume. This is especially galling given that I sent my used oil to be recycled and relied on authorized used oil handlers. In the vast majority of Superfund sites where auto dealers have been designated as PRPs, liability has centered around the management of used oil. In most instances, including my own experience, auto dealers demonstrated environmental responsibility by accepting used oil from consumers and "do-it-yourselfers" and sending it to licensed recycling or reprocessing facilities. As a variation of an old adage goes, "No good deed goes unpunished."

The current strict, joint and several, and retroactive liability system of Superfund is unduly harsh on small businesses. Under this liability scheme, **any** contributor to a site is potentially responsible for the entire cost of cleaning a Superfund site, even if the volume of waste they contributed to the site was minimal. Under retroactive liability, small businesses can be held liable for clean-ups that resulted from alleged waste management activities occurring years or even decades ago. It need not

be demonstrated that a small business was negligent or at fault to establish liability. Often, as in my case, small business automobile dealers are named as PRPs to a site based solely on the sketchy memory of truck drivers who picked up used oil as long as 20 or 30 years ago. In other cases, dealers are identified as PRPs by EPA after a search through the telephone book for those located in close proximity to the Superfund site.

To resolve this inequity, NADA supports the elimination of retroactive liability prior to January 1, 1987. The lack of records prior to this date creates clear injustices to small businesses. EPA and big business have the resources to force small businesses into inequitable settlements since we don't have the money or documentation to "prove" that we didn't contribute the large amounts of waste alleged. In my case, the \$78,000 of cleanup liability I was assessed is an absolute travesty of justice. The problem was that I couldn't prove a negative. It was impossible to prove that I didn't contribute the huge amounts of used oil alleged. Something is clearly wrong with a system that forces a small business to bear the burden of proof that it didn't contribute an alleged amount of waste, especially when there are no reliable records. As a result of a lack of records, retroactive liability should be eliminated for de minimis contributors. Furthermore, for those contributors who arranged for recycling, liability should be eliminated regardless of the date.

NADA also strongly supports the inclusion of an expedited settlement mechanism for de minimis PRPs at any Superfund site. A expedited settlement process will allow small businesses to have their liability determined early in the process and proceed to a final settlement. If an appropriate expedited settlement mechanism had been in existence at the time, I could have avoided the

\$100,000 in transaction costs and would not have been entangled in the process for over five years.

One easy way to accomplish this objective is to allow de minimis contributors to have their liability determined at the beginning of the allocation process. It should be assumed by all parties that potential contributors are de minimis, unless the government can establish by clear and reliable evidence that the contribution was greater than 1 percent. In the Arrowhead case, alleged contributors of 10,000 gallons or less qualified for a de minimis settlement. Since my alleged contribution was far more than this amount, I did not qualify.

I firmly believe the government should bear the burden of proof in designating potentially responsible parties. My personal experience suggests that I was automatically guilty in the eyes of the government and the larger PRPs. Congress should demand fairness in the administration of our environmental statutes--guilty until proven innocent is not the norm and should not be tolerated by federal policymakers.

Some proposals have suggested that the term de minimis contributor be defined as any party whose total volumetric contribution to a site is determined to be 1 percent or less. While we strongly support this proposal, it becomes irrelevant when records do not exist to establish how much and what type of waste was contributed by an alleged party at the site. This is especially true when the burden is on the small business to prove that it did not contribute more than 1 percent.

My story is just one of many businesses that have been unjustifiably burdened by an unfair system. The future of my business is jeopardized since the future liability makes my business too risky for

a potential buyer. In addition to the harm imposed on our family business, employees have suffered because the decline in corporate profits has hurt employee pension plans.

Thank you again, Madame Chair, for the opportunity to express the views of NADA before this committee. I hope my presentation will give you a clearer picture of the devastation wreaked on America's small business community by Superfund. I also hope that this committee, which is the protector of small business, will become actively involved with this bill to help ensure that the incredible inequities placed on small business owners by this law will be corrected. I will be pleased to respond to your questions.

Citizens for a Sound Economy

CSE Testimony

(202) 783-3870

Testimony of Susan Eckerly
 Director of Regulatory Affairs
 Citizens for A Sound Economy
 before the
 House Committee on Small Business
 October 19, 1995

Good Morning. Mrs. Chairwoman and Members of the Committee: Thank you for the opportunity to present the views of Citizens for a Sound Economy, a 250,000 member research, education, and advocacy group that promotes market-based solutions to public policy problems.

I want to commend the committee for holding today's hearing on how the Superfund program's liability scheme affects small business. The Superfund program represents a textbook example of a broken federal program in need of repair. Despite the billions that have been spent, it has failed fundamentally to meet its mission to clean up hazardous waste sites. Unfortunately, the losers have been small business, urban areas, and local governments, while the winners are lawyers and the EPA budget. This Congress has the opportunity to enact significant reform of the program and show how a reformed program can clean up sites faster and cheaper. A central element to reaching this goal is full repeal of retroactive liability.

In the rush to enact a reform bill this year, we should examine closely whether this legislation indeed will include the necessary reforms. CSE is hesitant to support partial reform this year based on a premise that the program can be fixed later. We, instead, support legislation that will solve the current problems and speed the pace of cleanup at a lower cost.

Fixing the Superfund Program

First, let me outline briefly CSE's principles for Superfund Reform. While today's hearing focuses on the liability issue, other reforms must be enacted to relieve the costs of the program and speed cleanup. All of these issues, taken as a package, will in the long run benefit small business and other parties affected by the clean-up.

- **Greater reliance on risk assessment and cost-benefit analysis.** In many instances, sites are placed on the National Priority List without proper consideration of the risk posed to the public. Analysis that exaggerates the risks by up to 10,000 times is used to identify future Superfund sites. Worst-case scenarios are used, such as a child eating dirt for 70 years. Consequently, much of the risk identified by the EPA is imaginary, based on assumptions of fictitious, "maximally exposed individuals." One study of 77 Superfund sites found that 92 percent of the cancer risk identified by the EPA was future risk that was dependent on the agency's assumptions about future behavior. It is important to realize that there are alternative uses for resources and excessive standards that do not address real risks divert resources from more important uses. A proper cost-benefit framework will allow regulators to develop a matrix that correlates the costs and benefits of a cleanup.
- **Reform existing liability rules.** Joint and several liability and retroactive liability rules in Superfund increase the cost of cleanups and also delay cleanups. Liability rules are responsible for the costly litigation generated by the Superfund program, and the potential responsible party system has spawned a search for deep pockets that often leads to inequitable outcomes that do little for environmental quality. In addition, lender liability unnecessarily restricts the resources available for redeveloping blighted urban areas. Constructive Superfund reform must address each of these liability issues. In particular, retroactive liability must be repealed pre-1987 in order to lower transaction costs most effectively.
- **Shifting responsibility for cleanups to the state and local level.** The federal role in the Superfund program must be reassessed. By nature, hazardous waste sites are local issues that, in most instances, should be addressed at the state level. Congress should cap the National Priorities List and increase the role that states play in identifying sites and establishing priorities for cleanups. Reassessing the role of the federal and state governments also will provide an opportunity to establish new incentives to provide more accountability of government expenditures on the Superfund program.
- **CSE maintains that no new taxes should be included in any Superfund reform measures.** Despite the difficulty in funding full retroactive repeal, Congress should not impose any new taxes to fund Superfund. Reforms that eliminate costs on administrative overhead as well as reforms to the cleanup standards, among other options, should generate enough savings that can be applied to cleaning up orphan sites.

Pending Legislative Solutions

Rep. Zeff (R-NH) has introduced, and Representatives Oxley (R-OH) and Shuster (R-PA) are ready to introduce, legislation that addresses some of the reform principles outlined today. CSE feels items in both bills would help fix the problem and help relieve the burden on small business.

Liability Reform. As stated earlier, one of the most fundamental reforms of Superfund, particularly with respect to small business, must be eliminating the current retroactive liability system. Rep. Zeff is to be commended for taking on this issue and proposing full repeal. In addition, he repeals the joint and several liability scheme and replaces it with a proportional liability system. This type of structure would better ensure that the polluter indeed does pay.

Unfortunately, the most recent proposal being discussed by Representative Oxley appears to be backing away from an earlier commitment to full repeal. His principles for reform released in July, called retroactive liability "unfair and counterproductive," and called for a pre-1987 cutoff "to truly remove the trial bar from the cleanup equation." Citing funding problems, the most recent draft Oxley proposal eliminates liability for municipal landfills and de minimis contributors, and sets up a proportional liability allocation system.

Rep. Oxley's new proposal would fail to end one of the most serious problems associated with retroactive liability: its affect on the pace of cleanup and legal costs. Under the proposal, small business will still have to spend resources to prove their innocence, the level of contribution, or their ability to pay. Complicating this issue is the lack of records available prior to 1987 for small parties as opposed to larger companies. Even the de minimis one percent can still spell financial ruin for small businesses who often have little if any profit margin to spare and did not dump illegally at the site.

To his credit, Rep. Oxley has pointed out throughout the drafting of his legislation that financing full pre-1987 repeal would be difficult. We encourage him to continue working with the Republican leadership, the Ways and Means Committee, and the Budget Committee to find a solution that can fix once and for all the Superfund program.

Remedy Selection. A key component of Superfund reform is improving remedy selection for cleaning up sites. The current standards used by EPA drive up cleanup costs, which in turn, hurts those small businesses that must pay for cleanup or who cannot find financing available for site start-ups.

Rep. Oxley is to be commended for the remedy selection title of his proposal. His draft calls for several noteworthy reforms: risk assessments of a site to be based on the best estimates of risk; proposed remedies that take into account future uses of the land; all options for addressing a site must be considered, including containment; and the agency must choose a cost-effective solution based on reasonable risk. Finally, records of decision would be subject to judicial review.

State and Local Control. The Oxley draft also includes other important reforms that give state and local governments more control over whether more sites should be added to the NPL and also allows states to take control of Superfund sites. An important element for small business and all parties adversely affected by the program is that it limits the number of sites that can be added to the NPL over the next seven years and prohibits any new sites from being added after that.

Answering Arguments Against Liability Reform

Currently, much of the debate concerning proposed Superfund legislation is centered on how to address retroactive liability. Several arguments are used repeatedly to undercut full repeal. Let me address each of these briefly:

- **The taxpayer, not the polluter, will pay if retroactive liability is repealed.** Supporters of the Superfund program claim that the current liability scheme is effective because the polluter pays for cleanup. They argue that full repeal will let these polluters off the hook and the taxpayers will have to pay for their wrongdoing.

The current system, however, casts a wide net in search of PRP's and encourages them to file suits to find other parties to minimize their costs. We have all heard the horror stories of those caught in this net, those who have purchased the land contaminated by others, those who have acted legally at the time they discarded waste, and those who contributed nothing more than trash to a site. This group includes a large number of small businesses, civic groups, and local communities---many of which are hardly what we think of as "polluters."

Moreover, the delays and costs of litigation hardly make Superfund an efficient program that the taxpayer can be proud of. A study by National Strategies, Inc. found that in 1994, transaction costs for the public and private sectors totalled \$1.34 billion while roughly \$1.47 billion of cleanup funds were raised. In other words, a net of only \$0.13 billion was raised by the Superfund program.

Finally, the taxpayer already pays for the Superfund program. The trust fund receives dollars from general revenues. According to EPA Administrator Browner, there are currently 3,900 agency employees across the country working on this program. That amounts to a 3 to 1 ratio of EPA employees to NPL sites. Either the trust fund or the taxpayer is paying for this staff to administer the program.

- **Full repeal cannot be funded unless new taxes are imposed.** In the search for funds to pay for full repeal, one option floated frequently is imposing new taxes. Proponents of this funding option point to last year's bill that established a tax on the insurance companies. The question is asked, if they agreed to a tax last year, and since they stand to benefit from full repeal, why don't they step to the table this year?

From a political standpoint, one of the major reasons the bill fell apart last year was because the insurance industry was not united over the tax. Nothing has changed to make them more united this year. The real issue, however, should be that no new taxes are acceptable, period. We should not forget that taxpayers, corporate and individual, have spent \$12 billion supporting a program that has only delisted 83 sites from the NPL.

Given that the funding shortfall for full repeal is \$300 to \$800 million, there are a variety of options that have been pointed to that could generate this funds. Among these are cutting some of the 3,900 staff at EPA devoted to the program and using savings from reformed remedy selection at federal NPL sites. These two options alone have been projected to save over \$500 million. In all honesty, the issue is not the need for more taxes but whether Congress has the political will to say no to new taxes and support full repeal.

- **It will slow down the pace of clean-ups.** Repealing retroactive liability will take the lawyers, bureaucrats, and consultants out of the system. Eliminating litigation delays will allow cleanups to begin immediately, instead of waiting for issues to be decided in court. Reform based on reasonable clean-up standards, minimal bureaucratic involvement, and more power to state and local governments will improve the pace and lower the cost of cleanup.

- **Liability repeal is unfair to those companies who have complied with current law.** Nothing is more unfair than penalizing small businesses and local governments for innocent conduct and burdening them with the needless expense of retroactive liability. First, retroactive liability is wrong. It runs counter to our sense of fair play.

Second, two wrongs do not make a right. Superfund's retroactive liability should not continue to punish innocent small businesses, local governments, schools, and civic organizations. Many of the companies that have paid cleanup costs under the current program did not do anything illegal but were faced with the impossible choice of paying cleanup costs or facing years of litigation, exorbitant legal fees, loss of credit, and a threat of bankruptcy. We must repeal retroactive liability rather than continue to cause harm to more innocent small businesses and local communities.

Conclusion

Given the reform nature of this year's Congress, CSE had high hopes at the beginning of the year that meaningful Superfund reform could be enacted. We urge Congress not to return to the failed legislation of last year and to continue its work to find a way to repeal fully retroactive liability.



NFIB
National Federation of
Independent Business

Testimony of
Kelvin R. Herstad
President/Treasurer
United Truck Body Company, Inc.

Subject: Superfund Liability
Before: Committee on Small Business
Date: October 19, 1995

I would like to thank you, Chairman Meyers and members of the Committee, for inviting me to testify before you today. My experience with Superfund and its liability system began on June 4, 1986, when I received a letter by certified mail from the United States Environmental Protection Agency, Region 5, Chicago, Illinois stating the Agency was "conducting a remedial investigation and feasibility study at Arrowhead Refinery, Hermantown, Minnesota." My business was one of several hundred businesses and other entities to receive such a letter in the Duluth area. Thus began a process that covered eight years, cost millions of dollars to litigate, pitted small business against large business, federal agency against state agency, and while the final cost has been estimated and assessed, work has barely started on the site in question. There remains serious doubt whether work should ever be done because many experts feel the site can be contained, monitored, and otherwise left alone. In their opinion, it causes no harm to the environment or humans around the site.

Arrowhead Refinery operated for years on the edge of Duluth in a township, now a city, called Hermantown. Its principal business was to collect waste motor oil from service stations, governmental agencies, the Air Force, mining companies, utilities and any other generator of motor or hydraulic oil. . It often paid large generators for their oil. It refined the oil and sold it back to many of the entities that gave/sold them the waste oil. This was recycling long before the term and/or practice was even thought of. I don't know how far back this company started but I brought my car

to its location in 1952 for what was called a "hot oil flush".

The process of refining was to heat the oil, mix it with clay, filter it, separating the clay and impurities from the oil. The company dumped the residue clay containing heavy metals on the back of its property and that residue has now become a hazardous waste site under the Superfund legislation.

The company went out of business some time in the late 1960's. Another company, an oil distribution company, used the warehouse facilities to distribute oil from the site, but did not acquire any of the liability of the site in the process. So, 100 percent of the site clean up fell upon the entities that recycled their oil by giving/selling it to Arrowhead Refinery.

From what I understand there were not many records left over from Arrowhead Refinery so the federal and state agencies looking into the site interviewed a former driver, now up in years, as to where and when he went to pick up waste oil.

Although he delivered as well as picked up oil it didn't seem to matter. If he said he called on your business or entity, you were served with the same letter I got. What records were left over from Arrowhead Refinery were in someone's garage. Papers of various types were found. Any person whose name was found in those papers was sent a letter. The burden of proof was not in the laps of the recipients to prove they didn't give/sell oil to Arrowhead Refinery.

That was my case. We deal in school buses and truck equipment.

We generated very little waste oil, and quite frankly, what we did generate, our employees argued over to see which one would be able to take it home and use it as a dust suppressant for their driveway. Our main business with Arrowhead Refinery was to sell them bodies for their trucks that delivered oil products, and buy hydraulic oil to use on the new truck equipment we sold. The letter from the Environmental Protection Agency stated, "Pursuant to statutory provisions," outlined in the letter, "you are hereby requested to submit any and all of the following information, that you may have, concerning the Arrowhead Refinery site, in Hermantown, Minnesota:

1. Copies of all shipping documents or other business documents relating to the transportation, storage, disposal and/or processing of waste materials or substances at or to the above reference site.

2. A detailed description of the generic, common and/or trade name and the chemical composition and character (i.e., liquid, solid, sludge) of the waste material sent by you or by anyone else, to your knowledge, to the above referenced site.

3. For each hazardous substance above, please give the total volume, in gallons for liquids and in cubic meters' for solids, which was sent to the site by you or by anyone else to your knowledge. Additionally, list when the substances were sent.

4. What arrangements were made to send hazardous substances to the above referenced site? What type of transportation was used (i.e., tankers, dump trucks, drums)?

5. List the name and addresses of each person or company, which you have reason to believe, generated the hazardous substances which were sent to the site.

6. Copies of all records, including analytical results, safety data sheets, which indicate the chemical composition and/or chemical character of the waste material(s) transported to, stored or disposed of at the above referenced site or offered for transportation to, storage or disposal at the site.

7. A list and description of all liability insurance coverage that is and was carried by you including any self-insurance provisions, that relates to hazardous substances and/or the above referenced site and copies of all of these insurance policies."

I dutifully fulfilled the request as best as I could. I also made an extra copy and deposited it in the lap of a U.S. Senator who happened to be a friend of mine. I accompanied the deposit with the comment, "With friends like you authorizing legislation like this, who needs enemies!"

So the saga of Arrowhead Refinery began. The federal agency in Chicago and the Pollution Control Agency in Minnesota were both involved. From what I understand, the EPA had assigned the Minnesota Pollution Control Agency the responsibility for all Superfund sites in Minnesota with the exception of one or two sites. Arrowhead was one of these exceptions. What one wanted, the other went one better. They both asked for the same documentation. We weren't sure who was controlling the process.

Because I had been active in politics, I would get calls from various litigants complaining or, in some cases, almost crying, wondering what was going to happen.

Sometime during 1986 to 1989 the major contributors formed a group called MASC, an acronym for Minnesota Arrowhead Site Committee, to represent the 30 larger litigants in this matter. The EPA suggested a figure of 60 million dollars to clean up the site after its technicians studied the site. MASC countered with its own experts and came in considerably lower.

Suddenly, in 1989 the EPA took twelve parties to court, three of whom no longer were in business nor had much in the way of assets. The reason for the sudden action was that the EPA thought the Statute of Limitations would run out at the end of three years if formal action was not commenced. As I understand it, the part that would run out would be the EPA being able to charge its cost to the process. The twelve named moved to delay proceedings and attempted to bring in other parties to the suit. The intent was to at least include the 30 members of MASC.

However, once the motion was to include other parties in the suit, all parties, large and small, found to be contributors through depositions, were included. If the EPA had originally included the members of MASC in its suit that motion would probably not have been made. In my opinion, EPA screwed up and caused a mess for all over the next five years of litigation by hastily filing a suit just to cover its own pocketbook.

The membership in MASC included a large mining company that

was charged with 35 percent of the fault, a large municipality with 4 percent, and another mine with 3 percent. Five agencies of the federal government were next, with 2 percent of the fault. (They were the Department of Defense, Post Office, U.S. Army Corps of Engineers, Coast Guard, and Army Reserve.) The rest of the litigants were found to be 1 percent or less at fault.

During the next five years many hearings, depositions, and court appearances were made. Engineering studies were conducted. A sewer line was run several miles to take water from the site. Site monitoring was installed. Water mains were run to homes adjacent to the site even though no contamination was detected in any wells around the site. All of this was paid for by the members of MASC.

During this time the small litigants were being informed of their potential liability by MASC which was a result of studies it had commissioned. Small business owners worried and wondered if they would survive this ordeal. Two cases illustrate the stress people came under during this process: Mark Johnson of Sonju Motors, Inc., Two Harbors, MN said he was told in one phone conversation with an employee of one of the agencies involved, "Don't worry, we don't want your home or car, we're just after your business." Mark said, "Without the business, you can have my home and car because I won't be able to afford either." Jake Hemmerling, an 80-something retired service station owner said he couldn't sleep at night because of what might happen. He said a fellow service station owner recently died, and Jake was thoroughly

convinced he died due to worrying about Arrowhead Refinery.

I arranged for car dealers to meet with our local congressman as well as my friend the senator on different occasions. On one occasion, one car dealer and his wife sat with tears in their eyes because they couldn't sell their business because of this matter and they were counting on the proceeds for their retirement.

I could go on and on about what transpired during the eight years of litigation, hearings, and depositions. The point is that there is no reason for something like this to cause eight years of stress on people who have been good citizens and good business people.

The result of the eight years of stress is this: The cost of cleaning up the site has been determined to be \$34 million. The EPA agreed to contribute \$10 million. However, between \$4 million and \$6 million of this will be paid back to the EPA for its cost of technical support and administrative expense. Thirty-eight major players, including members of MASC agreed to \$18 million and others were assessed the remainder. Mark Johnson of Sonju Motors, Inc., was assessed \$66,000 and paid 50 percent more to be released from any future liability. He also joined MASC for a year at a cost of \$10,000 and estimates his legal bills at another \$15,000 dollars. Twenty-seven car dealers paid various amounts with the largest amount being \$250,000. So far, out of the \$34 million, \$4-6 million has gone to the EPA; MASC has spent \$6.5 million on engineering, water and sewage lines, containment ditches and fencing as well as other costs. These figures do not include the

legal fees or the countless hours of time going to hearings and meetings.

And the site has yet to be cleaned up! The estimate for actual clean up is \$22.5 million. This is a far cry from the original estimate of the EPA - \$60 million.

I spent considerable time working on this during the eight years. Part of that time was on my own behalf. I was one of the fortunate ones that was dropped from the list because there wasn't any proof of our involvement or because MASC made a motion to U.S. Judge Paul Magnuson to excuse the very small contributors. The expense I incurred up to that point in legal fees approached \$10,000. I spent countless hours going to meetings, phone calls to employees of the EPA and PCA as well as talking to present and former employees of ours about what they could remember about our dealings with the site owner. The rest of the time I tried to get to people that could change this legislation so that it wouldn't be so unfair and so burdensome.

I feel very strongly about the need to reform Superfund and its liability system. So strongly, that I have taken time away from my business and my family to come to Washington to plead with you to reform this broken program this year. In conclusion, I hope you will consider the following recommendations in your deliberations on Superfund legislation:

1. Direct the Environmental Protection Agency to clearly define whether it will oversee a Superfund site or will the state

agency in the state in which the site is located. Once this is done only the responsible agency should be involved.

2. It has been stated repeatedly that those who profited from the pollution should be made to clean it up. When a company makes a profit, the federal government also profits through the profit tax it assesses business. So an argument can be made that the federal government should pay also. Let's just get off this type of reasoning and realize that when a lot of the pollution was done there wasn't any law or regulation against it. In my opinion, it is wrong to penalize retroactively for mistakes not recognized as mistakes when they were made. The Environmental Protection Agency, through Superfund, should go into each site as a participant up front and not as the last resort. If the \$10 million had been offered up front on Arrowhead there would have been a lot less time spent in getting it resolved.

3. Consideration should be made to the benefits versus risks of identifying a site and monitoring it. The federal and state agencies involved with Arrowhead attempted to put the site into a 'before pollution' condition. Sites should be studied from a health risk mentality and not from an environmental restoration mentality. Contain a site, determine the risk to health, and have, as a goal, to reduce that risk to zero.

4. It appears to me that the EPA has a mechanism to fund itself through the system of charging a Superfund site for any costs it incurs. In the Arrowhead case, MASC could not limit or control the cost of the EPA but had to agree to reimburse the EPA

for its cost. Some of those costs were excessive. For instance, EPA officials rented Cadillacs to go from the airport to a hearing less than five miles from the airport.

5. Some consideration should be given to holding parties not involved in the clean up with any future liability once clean up has begun. The government does not want to assume any liability yet wants to control the clean up totally.

6. The EPA is required in Section 119 of the Superfund Amendments and Reauthorization Act to indemnify response action contractors (RACs). I understand the EPA, under new guidelines, will not offer indemnification to new contracts without first attempting to hire contractors not requiring indemnification protection. This will make it almost impossible for anyone but the biggest contractors to do the work. And, in many cases, not even the biggest will get reasonable indemnification policies from the insurance industry. The original Section 119 protection should be retained.

7. In order to avoid future problems, the government has to assume responsibility in the collection, storage, and disposal of hazardous waste when it licenses people in the business. It seems incomprehensible to me that when a person comes to me with a permit from a federal agency to haul/dispose of hazardous waste that I can still be held liable for that person's action. This is an area that must be corrected.

8. It seems to me that any reauthorization should include consideration of the fact that contributors of waste did it at

different times. Retroactive liability is the worst part of Superfund. I believe it should be done away with. This Act reversed our whole tradition of innocent until proven guilty to you're guilty prove otherwise. If total retroactive responsibility cannot be removed from the Act then incorporate some type of statute of limitation or statute of repose that limits liability to a period of time. We have to have some reasonableness in this Act.

Again, thank you for the opportunity to testify.



"Superfund and Small Business"

**Testimony by
Raymond J. Keating
Chief Economist
Small Business Survival Committee**

**before the
Committee on
Small Business**

U.S. House of Representatives

October 19, 1995

Mrs. Chairwoman and Members of the Committee, I thank you for inviting me here today to discuss Superfund's impact on small businesses and ideas for reform. My name is Ray Keating, and I am chief economist for the Small Business Survival Committee, a small business advocacy organization with over 40,000 members across the nation.

Since its creation in 1980, Superfund has unleashed the bloated bureaucracy and gross inefficiencies of the federal government on unsuspecting businesses across the nation; turned essentially local or, at most, state problems into national woes; set arbitrary and unattainable criteria for compliance; sent legal costs skyrocketing; forced many businesses to close their doors; reduced capital available for investment in certain industries; restrained job growth; and damaged U.S. international competitiveness. Quite a record for one piece of legislation, but there is still more.

Small businesses -- whether seeking out additional capital for growth or just fighting to stay alive -- are particularly vulnerable to the woes of Superfund. Legal costs, expenditures for cleaning up sites to which they contributed little, groping through the Environmental Protection Agency (EPA) bureaucracy, and a thick governmental fog obscuring future costs and risks, can stop a small business in its tracks and even kill it.

At the core of Superfund's problems is its mechanism for assigning liability to perfectly innocent parties. If a business disposed of waste -- toxic or non-toxic, large or insignificant amounts -- in good conscience and in complete accordance with the law, it can still be held liable for the costs of cleaning up the disposal site if it later became a Superfund site. Notions of

responsibility and fairness mean absolutely nothing under Superfund.

Indeed, in assigning liability under Superfund, the Environmental Protection Agency (EPA) utilizes highly questionable criteria:

- Superfund allows for strict liability, i.e., regardless of intent or negligence.
- Superfund liability is retroactive, meaning that actions taken before the law was enacted still apply. So even if firms were in full compliance of the law, Superfund still exposes them to liability.
- Joint and several liability also applies under Superfund. Therefore, the EPA can require that one business pay for the entire clean up irrespective of the degree of its own contribution to the waste site and without consideration to the total number of contributors. No concept of "fair share" exists under Superfund. Seeking relief, this unfortunate EPA selectee files contribution suits against other businesses connected to the waste site. All parties tend to turn to their insurance companies for reimbursement. Legal costs balloon.
- Current or past owners of a Superfund site who contributed absolutely nothing to the waste problem can be held liable.
- The burden of proof lies with the accused to prove their innocence rather than the EPA proving guilt under Superfund.

The EPA's main criteria for assigning liability for a Superfund site often seems to merely be "deep pockets" -- whoever is able to pay will pay for a site clean up. Of course, this is not an ironclad rule. After all, sometimes deep pockets cannot be found, in which case anyone will do -- including small businesses with but the most distant relationship to the site. And even if the EPA finds "deep pockets," these same "deep pockets" seek to recover their own costs by bringing contribution suits against these same small enterprises.

As one might expect, this system has developed into a costly, legal quagmire. Individual Superfund horror stories abound -- seemingly too numerous to count. These are well documented, and I certainly can supply the Committee with many, but for now I would like to touch upon some of the overall, weighty costs of Superfund. For example:

- Of the 1,292 "worst" waste sites on the Superfund National Priority List (NPL), only 237 have been cleaned up -- about 18 percent -- according to Heritage Foundation analyst John Shanahan. One should note that this is a more optimistic accounting of cleaned up sites. On February 14, 1994, for example, Business Week reported that out of 1,270 sites on the Superfund list just 49 "have been completely cleaned up."

- Yet, the federal government has spent almost \$10 billion on Superfund and forced private parties to kick in another \$80 billion. The average NPL site takes 10 years to clean up at an average cost of \$30 million.

- On average, transaction costs account for 32 percent of total private-sector Superfund costs, with litigation making up 65 percent of this amount or 21 percent of total costs.

- Once caught in the Superfund liability morass, it becomes much more difficult for a firm to attract capital, make investments, and therefore, grow and create jobs. Superfund's strict, retroactive, and joint and several liabilities create considerable uncertainties for firms. Such unknown costs chase away investors and make expansion plans quite dubious.

Small businesses suffer most under these added costs and risks. Without the Superfund cloud hanging over it, investing in, starting up, and expanding a small venture is already a risky undertaking. Superfund liabilities only raise the hurdles faced by small business even further.

- Superfund also creates disincentives for investment in long industrialized urban areas. The threat of enormous liability discourages firms from buying land in and renewing formerly industrialized areas. Instead, it's safer to build new facilities elsewhere. So many U.S. cities already impose large burdens on the private sector -- including high taxes, heavy regulations, bloated government budgets, and more -- and Superfund adds to these costs. Under such circumstances, it is no wonder that the entrepreneur is becoming an endangered species in many U.S. cities.

- Finally, according to a Center for the Study of American Business Superfund study, "Superfund imposes much more stringent regulations on manufacturing and other firms doing business in the United States than these companies would be required to meet in other countries." Interestingly,

in nations like Canada, Mexico, Germany, Japan, Great Britain, and others, liability rarely reaches entities that legally disposed of their waste; instead, liability is linked to fault.

What should be done? Understanding the constraints of the political process, the Small Business Survival Committee supports a three-step reform plan.

As a first step, we support many measures currently under consideration in Congress, including repealing retroactive liability for all actions taken before 1987, as suggested by U.S. Representative Bill Zeff (R-NH) in his proposed Superfund reform bill -- thereby eliminating costly litigation at about 80 percent of Superfund sites; from 1987 forward, basing liability on the proportion of waste a party contributed to the site; using science-based risk assessment to determine clean up remedies; capping the Superfund NPL of sites so that the Superfund program can be phased out; and no imposition of any new taxes.

As a second step, the Small Business Survival Committee supports the complete repeal of the strict, retroactive, and joint and several liability schemes. To achieve real fairness, even proportional liability must give way. Superfund should only assign liability to individuals and businesses who broke the law, who were negligent, fraudulent, deceptive, etc. This is the only true "polluter pays" scenario. Small businesses, or any sized business, that simply sent waste to a site in an honest manner, in full compliance with the law, should have absolutely no liability whatsoever. In essence, they are not polluters.

Step three, or the final goal of Superfund reform, should be to terminate Superfund. In

fact, a waste site clean up is not a federal issue, unless, of course, operated by the federal government or undertaken due to a new federal law or mandate. In these two instances, federal responsibility is clear. Otherwise, waste site clean ups should be left as local, or at most, state issues. Localities are in a better position to judge the costs and benefits of clean up. If completely unable to carry the costs of a necessary clean up, then state government should be turned to for assistance.

State and local clean-up efforts have proved to be far more efficient, timely, and less costly. Local individuals possess a far better understanding of their community's circumstances and needs than do EPA bureaucrats.

Once again, I thank you for inviting me here today to address the Superfund issue, and I would be glad to answer any questions you may have.



National Association
of Metal Finishers

WRITTEN STATEMENT
ON
THE EFFECTS OF SUPERFUND LIABILITY ON SMALL BUSINESS
BY THE
NATIONAL ASSOCIATION OF METAL FINISHERS
BEFORE THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
OCTOBER 19, 1995

Introduction

The National Association of Metal Finishers (NAMF) represents the interests of over 600 member companies in the surface finishing industry. NAMF members provide electroplating and other surface finishing techniques for a variety of industries, including medical, automotive, aerospace, defense, and general manufacturing. Metal finishing operations impart an array of characteristics to finished parts, industrial components, and products. Primary characteristics are corrosion and wear resistance. Without this protection, our society would find it necessary to replace items such as automobiles and other consumer and industrial goods with much greater frequency. The industry's processes reduce the need for basic metals and other resources through increased product longevity.

NAMF members are typically "job shops" with 20-25 employees and an annual sales of \$1 to 1.5 million. The metal finishing industry has become one of the most highly regulated small business industrial sectors over the past 15 years. Our members are compliance experts in Clean Water Act effluent discharge standards, RCRA hazardous materials regulations, Clean Air Act standards, Emergency Planning and Community Right-to-Know reporting requirements, and a host of other industrial standards. The costs of compliance are high--the U.S. Census Bureau reports that in 1991 plating operations spent \$42 million in pollution control and prevention capital expenditures, roughly 27.5 percent of their total capital expenditures. The metal finishing industry currently participates in the Environmental Protection Agency's Common Sense Initiative to identify and explore cleaner, cheaper, and smarter regulatory options.

NAMF is a charter member of Superfund Reform '95, a broad-based coalition of local governments, small and large businesses and insurers dedicated to achieving fundamental Superfund reform in 1995.

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Mr. David Norwine, the National Chair of NAMF's Government Relations Committee, presented oral testimony before the Committee on Small Business today. Mr. Norwine is from Haward Corporation, a metal finishing operation in North Arlington, New Jersey, where he has served for 38 years as vice president.

Mr. Norwine continues to oversee Hayward Corporation's activity at the Chemical Control Superfund Site where the company has been one of approximately 350 PRPs for almost 10 years. Mr. Norwine served on the allocation committee for the site. It took two years of meetings before the committee of lawyers -- only Mr. Norwine and one other person were not lawyers -- sought an outside consultant to analyze the list of waste brought to the site. Of the money Haward Corporation has spent at the site, 78 percent has been for attorneys' fees and transaction costs.

Mr. Norwine's Statement:

Good morning. Madam Chairwoman, members of the committee, my name is David Norwine and I am with Haward Corporation, a metal finishing operation in North Arlington, New Jersey, where I have served as vice-president for 38 years. I am here today in my capacity as Chairman of the Government Relations Committee of the National Association of Metal Finishers and as a representative of a company that is a PRP in a Superfund site. Some of my experiences reflect those of others in the electroplating and surface finishing industry.

I would like to begin by reading to you a paragraph taken from an October 1985 letter from the Michigan Association of Metal Finishers to Representative John Dingell.

As you know, the most controversial issue of a very controversial program is liability of waste generators. Even if a generator complies with all the regulatory requirements of the Resource Conservation and Recovery Act, including manifesting his waste and selecting permitted RCRA waste management facilities, he can still be found liable if his waste is later identified at such a facility that becomes a Superfund site. Through no fault of his own, and after following all the rules, the generator can be found liable for part (or all) of the cleanup costs of the facility that has now gone "sour." Because environmental impairment insurance is generally unavailable at any price, the generator faces the daily risk of bankruptcy caused by events and persons over which he has no control. We think you will agree that this is fundamentally unfair, and cannot be justified under any legal theory or principle of equity.

It is now October 1995 -- 10 years later -- and we have the same issue at hand. The metal finishing industry has long been a proponent of eliminating Superfund's retroactive joint and several liability. This is why we were extremely pleased when Congressman Oxley introduced his Superfund reform principles paper in July. We are deeply concerned, however, with the Oxley-Boehlert legislative proposal and Senator Smith's Superfund bill. While the current legislative proposals make enormous strides in establishing reason and flexibility in cleanup standards, they simply do not adequately address the liability quagmire.

To give a brief history, Superfund was enacted in 1980 to cleanup the risk from pollution to human health and the environment posed by the nation's worst dump sites. Plainly, Superfund has failed to achieve this goal with only a fraction of the 1,500 sites on the National Priorities List cleaned up over the last 15 years and with a cost in the range of \$40 to \$60 billion. At the heart of the Superfund travesty is the site-by-site financing of cleanup through retroactive liability. This system is inefficient and grossly unfair--it pits government against businesses, business against business. The result is years of unnecessary litigation, not cleanup.

Under Superfund's retroactive, joint and several liability, anyone who has the most tenuous connection to a Superfund site may be held liable for all or a part of the cleanup, regardless of whether the waste disposal was legal at the time. Thousands of innocent businesses, municipalities, and even organizations such as hospitals and school boards have been trapped in Superfund's liability net. Of the 100,000 or so potentially responsible parties ("PRPs"), small business makes up by far the largest sector. Potential liability results from having your waste or your industry's generic waste at a Superfund site. Once you are named as a PRP, the burden of proof shifts to you to prove that waste sent 20, 30, or 40 years ago to a site was not yours.

The draft Reform of Superfund Act of 1995 purports to get small business out of the Superfund liability net by eliminating liability at municipal co-disposal sites. Certainly this proposal would help municipalities and small commercial operations, but it ignores the plight of many others. Small manufacturing industries such as ours typically send waste at the direction of government to federally-permitted disposal facilities. Through no fault of our own, we continue to be liable at these facilities when they become Superfund sites. The metal finishing industry, in particular, has often opted for the more expensive but environmentally sound method of sending waste to metal recovery facilities. Carving out municipal landfills would simply shift the costs of liability to the small businesses and continue to hurt the local economy. Most small businesses are not dispozer at municipal sites and the Oxley-Boehlert bill continues to discriminate against us.

The legislative drafters contend that small business will also be helped by an expedited *de minimis* settlements. I can tell you from personal experience that the present system of *de minimis* settlements does not work due to the tyranny of the majority rule. Haward Corporation contributed .00087 % to the Chemical Control Superfund site. After 15 years and \$15,000, Haward still has not fully resolved its liability at this site. And the remediation, or protection of human health, the real purpose of Superfund, has not been completed.

A *de minimis* settlement at a multi-party site with a multi-million dollar cleanup is likely to be hundreds of thousands of dollars, before the addition of a premium (to preclude further costs). These are astronomical figures for most small companies that could easily put them out of business. Simply receiving a PRP notice creates financial uncertainty that can ruin banking relationships. Banks have always been skeptical of small business loans. The threat of Superfund liability eliminates those relationships, as banks assume that the economic viability of a company would be compromised. This stifles a small businesses ability to grow and contribute to the local economy. Small business owners are even wary of transferring ownership of the business to the next generation, as their liability will transfer.

De minimis settlements still capture small companies in the Superfund liability net with all the attendant problems. Lawyers and consultants must be hired because, under the current legislative proposal, the burden of proof still falls on small companies to refute allegations of liability and to prove or disprove their allocation share. We must prove our *de minimis* status which is difficult with little data on disposal practices from 20, 30, 40 years ago. Furthermore, the Oxley-Boehlert plan fails to adequately address the evidentiary standards under today's system that discriminate against small business. Unsubstantiated information, such as the recollections of truck drivers, should be excluded. How can we base \$100,000 liability on the 20-year old remembrances of a truck driver?

The current legislative proposal establishes an allocation system to apportion shares of liability among potentially responsible parties. The metal finishing industry has serious concerns about any allocation process for pre-1987 disposal. Prior to the full implementation of the hazardous waste manifest system in 1986 under RCRA, minimal records exist to show what wastes by what quantity and type went to what disposal facilities. Without such records, small companies are at a disadvantage in any liability allocation process. For all practical purposes, a neutral allocator would have difficulty in fairly determining shares of liability without disposal information from all parties involved. Transaction costs would not be reduced and the blame game will continue.

In reality, there can be no "fair share" of liability for parties who acted lawfully at all times--any liability system should exclude "innocent disposers" from costs. Haward Corporation did everything right. We took our waste material to a site that had been inspected, licensed, permitted, advertised, and recommended to us by the state and federal governments. But when the time came to accept responsibility, the agencies were nowhere to be found. We do not question the government's judgment, and we ask the same in return. What would this country be like if we came to mistrust our government's judgment?

A far more sensible approach would be to repeal retroactive liability and pay for cleanup through the Superfund's existing trust fund, which is financed by taxes on chemical and petroleum companies and a broad-based business tax. This approach would enable EPA to move expeditiously to the job of cleaning up the worst hazardous waste sites, and not wait until the legal battles have been fought. Eliminating retroactive liability is the only solution to address the fundamental unfairness of the current program to innocent disposers.

The metal finishing industry appreciates the fact that you have chosen small business and their Superfund involvement as the issue for this hearing and your deliberations. This industry joins many other interests both small and large in calling for meaningful reform that addresses both the economic costs and the environmental costs resulting from delayed cleanups. I thank members of the committee for the opportunity to comment.

BEFORE THE COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

October 19, 1995

TESTIMONY BY
EDWARD LEIGH QUINN, CHAIRMAN OF THE BOARD
K.J. QUINN & CO., INC.
SEABROOK, N.H.

Re: EPA Superfund Site in Raymond, N.H.

- K.J. Quinn was first incorporated in 1880. The company made and sold shoe finishes to shoe factories throughout New England. Starting with my great grand parents William A. and Katherine Josephine, there have been five generations of the Quinn family involved with the business. At present I am Chairman of the Board, and my brother Fred is President. My sons Leigh, Jr. and David are also employed by the company.
- We employ some 60 wonderful, hard working people, operating out of facilities in New Hampshire, Massachusetts and Missouri.
- We have always tried to be a good corporate citizen in environmental and other areas. For example, we created the position of Director of Safety and Environmental Affairs in the early 1970's and assigned this task to a senior chemist, years before mandates by federal or state government.
- Our products are well known worldwide and enjoy a high reputation in the three product areas we serve: (a) shoe finishes, (b) specialty water-based, polyurethane coatings, adhesives and polymers and (c) zero VOC radiation curable coatings, which are dried by ultra-violet light. We consider ourselves a leader in developing and commercializing environmentally friendly products.
- In 1974-77 our company contracted with Mottolo Waste Services for removal of solvent waste from our facility and, as we believed at the time, for transit to a lawful disposal site.
- In 1979, the State of New Hampshire environmental authorities discovered that Mottolo had dumped hazardous wastes of Quinn and a Massachusetts company named Lewis Chemical on an unauthorized site owned by Mottolo in Raymond, N.H.
- To put this into historical context, it was not until late 1980 when EPA adopted the RCRA regulations for a hazardous waste manifest system, and Congress passed the CERCLA (Superfund) law. As we all know, CERCLA has a retroactive effect on Quinn and other companies.
- In 1983 EPA, later joined by the State, commenced suit under Superfund against Quinn, Lewis Chemical and Mottolo.

- In the early 1980's, cleanup costs for the site were estimated at \$200,000-\$300,000. Quinn requested its insurance company to begin cleanup. The insurer declined, electing instead to defend the Superfund suit against our express wishes.

- From 1983-1992, Quinn was involved with the Superfund suit, with site investigation and remedial design studies, and with our own suit against our insurance companies. We had to sue our insurer when it denied liability after exhaustion of one year's policy limits.

- By 1993, over \$4,000,000 in so-called "transaction costs" (i.e., litigation, and studies by technical consultants) were incurred without cleanup of the site.

- Because Mottolo and Lewis Chemical were deemed insolvent, Quinn and its insurers were identified as the sole source of funds for the cleanup, although some of the worst pollutants were contributed by Lewis.

- In 1991, our independent consulting firm rendered its remedial study (RI/FS) in which it estimated remediation costs consisting of \$670,000 for performance of the Remediation Plan and \$350,000 for design and oversight.

- Quinn offered to perform the remediation, but because we did not meet EPA's financial criteria, EPA undertook the remediation itself with its chosen contractors.

- In 1993, Quinn established a \$500,000 escrow fund for remediation costs.

- We have been informed that during 1994 active remediation was completed and apparently was successful; however, the costs of the cleanup and ongoing monitoring expenses still have not been determined.

- The existence of the Superfund liability, unknown in amount, has had a chilling effect on Quinn's ability to operate and finance its business and to engage in effective long-range planning, investment and research.

- May I take this occasion to thank you, the Committee, for this opportunity to tell our company's story.

- I would welcome any questions the Committee may have.

TESTIMONY OF LOIS J. SCHIFFER
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

THURSDAY, OCTOBER 19, 1995

Good morning, Mr. Chairman and Members of the Subcommittee. I am Lois J. Schiffer, the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice. Thank you for inviting me here today to address the proposed reauthorization and reform of the Comprehensive Environmental Response, Compensation and Liability Act, known as "CERCLA" or "Superfund." As you know, the Department of Justice works together with the Environmental Protection Agency ("EPA") to enforce this statute, and represents the federal government in litigation and judicial settlements under CERCLA.

I. Introduction

The Superfund statute was enacted in 1980, in response to a public outcry when serious environmental contamination and health hazards were discovered at such notorious hazardous waste disposal sites as Love Canal and the Valley of the Drums. Decades of careless dumping and abandonment of hazardous waste from industrial operations had led to a proliferation of uncontrolled hazardous waste sites across the country. These sites were contaminating soil and groundwater, fouling drinking

water supplies, and threatening the health of the surrounding communities.

CERCLA was enacted to provide the federal government with authority and funding to clean up these sites. Congress also decided that the parties who had created these sites should pay for cleaning them up. This "polluter pays" principle is carried out by the liability and enforcement provisions of the Superfund statute.

Since 1980, the Superfund program has been implemented by three different administrations - the Reagan and Bush administrations for the first 12 years, and now by the Clinton Administration. During all of these years, the Justice Department has remained committed to the professional and effective enforcement of this statute. During the two years of this Administration, the Department has worked closely with EPA to review the Superfund enforcement program, to determine what works and what does not work well, and to develop both administrative and statutory reforms where they are needed.

We believe that the Superfund liability and enforcement scheme has been very effective in carrying out the "polluter pays" principle. The very successful removal program, which provides immediate, short-term response at Superfund sites, is carried out mainly by the federal government, but much of it is paid for through cost recovery from responsible parties. The remedial program, which provides long-term cleanup of environmental contamination, is now carried out mainly (over 75%)

by the responsible parties.

Perhaps most importantly, the liability provisions of the Superfund statute have caused a virtual revolution in industry's approach to hazardous waste, providing a strong incentive for pollution prevention and waste minimization efforts that have reduced dramatically the amount of hazardous waste that is generated in this country.

The effectiveness of the liability and enforcement provisions of the Superfund statute is no doubt a primary cause of the attack that is now being made upon it. Many of the parties who are most critical of CERCLA's liability scheme are the ones that stand to gain the most if it is repealed.

However, we recognize that the Superfund liability scheme has caused some problems. For example, the net of liability sometimes has been cast too wide, particularly in private contribution actions, bringing in parties that really do not belong in the Superfund liability scheme. This Administration believes that solutions can be found to these problems, without repealing all or a significant part of the liability scheme, and losing the many benefits that this statute has brought to us and can bring to us in the future.

II. Overview of the Enforcement Program

The "enforcement" side of the Superfund program refers to the EPA and Department of Justice actions to assure that the parties who were responsible for creating Superfund sites (known as "potentially responsible parties" or "PRPs") clean up those

sites, under the "polluter pays" principle.

A. Background

During the 15 years of its existence, the enforcement program has evolved from a litigation focus into a program in which most responsible parties enter into settlements or voluntarily comply with administrative orders, rather than litigating with the government.

In the early years after CERCLA's enactment in 1980, the federal government sought to enforce the liability provisions of the statute through lawsuits brought in federal court seeking injunctive relief under Section 106 of the statute. As under any new statute, many new legal issues had to be resolved, and litigation proceeded slowly. Moreover, courts were often called upon to resolve controversies over remedies. Having no expertise in these issues, the courts were understandably slow to resolve these controversies.

1. 1986 "SARA" Amendments.

When CERCLA was reauthorized by the Congress in 1986, through the Superfund Amendments and Reauthorization Act (known as "SARA"), Congress was not pleased with the slow pace of cleanups, and added several provisions both to strengthen the enforcement provisions of CERCLA and to encourage voluntary settlements instead of litigation. Two of the key provisions added to prevent cleanups from being delayed by litigation were: (1) Section 113(j) of CERCLA, which limits judicial review of EPA's selection of site remedies to the administrative record, in

accordance with traditional principles of administrative law (rather than using trials to decide remedy issues); and (2) the "pre-enforcement review bar" of Section 113(h) of CERCLA, which prevents responsible parties from delaying cleanups by seeking judicial review and stays of EPA's remedies or orders before the government seeks judicial enforcement.

In addition, Congress was concerned in 1986 that cleanups were not adequately protective. The SARA amendments added provisions to CERCLA directing EPA to select more permanent remedies, and to require compliance with "legally applicable or relevant and appropriate" standards ("ARARs") from other environmental laws.

The SARA amendments and reauthorization received solid bipartisan support. The conference report was approved by the Republican-controlled Senate by a vote of 88-8 and the Democratic-controlled House by a vote of 386-27.

2. 1989 "Enforcement First" Policy

In 1989, after reviewing the Superfund program and coming to the conclusion that cleanups still were not moving fast enough, the Bush administration instituted an "Enforcement First" policy. Under this approach, the federal government insists that sites for which there are responsible parties be cleaned up by those parties (under a settlement agreement or a unilateral administrative order if no settlement is reached), rather than undertaking a federal cleanup and later suing the responsible parties to recover the costs. This approach allowed federal

dollars to be focused more quickly and efficiently on those "orphan" sites where there are no viable responsible parties, and more effectively combined public and private resources to get more cleanups started.

B. The Current Enforcement Program

The combination of the SARA amendments (particularly the "pre-enforcement review bar") and the "Enforcement First" policy led to a dramatic shift in the performance of Superfund cleanups, from two-thirds of the cleanups being conducted by the federal government to over 75% of the cleanups being conducted by the responsible parties. The pace of cleanups also has picked up dramatically, with more cleanups being completed in the last three years than in all the previous years of the Superfund program combined. Remedies are now underway or completed at more than 700 sites - more than half of the sites on the National Priorities List (known as the "NPL").

At the same time, the federal government's litigation to force unwilling defendants to do a Superfund cleanup was dramatically reduced after the 1986 SARA amendments. Section 106 cases in which the government must litigate to obtain injunctive relief are now a rarity. Instead, the government obtains private party cleanups in virtually all cases either through settlements under consent decrees before litigation is filed, or through PRP implementation of EPA unilateral administrative orders under Section 106 (known as "UAOs"). Most of the active federal enforcement litigation under Superfund is for recovery of EPA's

costs incurred for site investigations, removal actions or other response activities.

The federal government's ability to obtain private party cleanups without extensive litigation is entirely attributable to the strength of the liability and enforcement provisions of CERCLA. These provisions enable us to leverage the dollars that are invested in federal enforcement, obtaining a very efficient return in private party cleanups for every dollar of federal funds that is invested.

C. Contribution and Insurance Litigation

We recognize that the federal government's successful enforcement efforts have spawned private contribution litigation among responsible parties, as well as contract litigation between responsible parties and their insurance companies. Most of the prolonged litigation and the high "transaction costs" involved in the Superfund program occur in these actions.

II. The CERCLA Liability Scheme

CERCLA is fundamentally a "remedial" and "restitutionary" statute. That is, it addresses the problems caused by hazardous waste sites, by compelling the responsible parties to clean up the pollution to which they contributed. It does not penalize defendants' past disposal with fines or penalties.¹ Nor is it a regulatory statute, prescribing

¹ The statute does contain a criminal penalty for violation of CERCLA's reporting requirements for releases of hazardous substances (see Section 103(b)), and civil penalties for failure to

regulations for the future handling of hazardous waste (that role is played by the Resource Conservation and Recovery Act or "RCRA").

Under CERCLA's liability provisions (see Section 107(a)), four basic categories of parties are made liable for the cleanup of Superfund sites: (1) owners and operators at the time hazardous substances were disposed of at the site, (2) current owners and operators, (3) persons who arranged for the disposal or treatment of hazardous substances (known as "generators"), and (4) transporters of hazardous substances for disposal or treatment, if they selected the site.

The courts interpreting CERCLA have consistently held that liability under CERCLA is "strict, retroactive and joint and several." While the first two rules are based primarily on statutory construction and legislative history, the joint and several liability rule is a common law rule that applies in situations where indivisible harm is caused by multiple defendants, as is the case at many Superfund sites.

A. Strict Liability

"Strict" liability refers to the fact that liability under CERCLA occurs if someone falls into one of the four categories of responsible parties listed in Section 107, reflecting the parties' role in the creation of the Superfund

comply with reporting requirements or administrative orders issued under the statute (see Section 109).

site. Strict liability does not require proof of "fault," e.g., that a particular party was negligent, acted in bad faith, or violated a statute that was in effect at the time.

Strict liability is the general rule of liability under environmental statutes, as well as other civil statutes. The strict liability standard of CERCLA was expressly patterned on its predecessor, Section 311 of the Clean Water Act.

The strict liability standard of Superfund and other civil statutes is necessary for effective statutory enforcement. Litigating "fault," as in tort cases, is extremely time-consuming and resource-intensive. It would be particularly difficult in CERCLA cases, where the records and memories of witnesses are often old and sketchy. If litigation over "fault" were required in CERCLA cases, the government's enforcement program would quickly become bogged down in litigation. Settlements would dry up, as parties would find it to their advantage once again to litigate with the government rather than settle. Transaction costs for litigation would increase, rather than decrease.

In short, it simply would not be possible to have a viable, efficient enforcement program, leading to the prompt cleanup of the many sites that need attention, without the strict liability standard.

B. Retroactive Liability

1. Background

"Retroactive" liability refers to the rule that

responsible parties are liable under CERCLA regardless of whether their hazardous substances were disposed of before the enactment of the statute in 1980. The statute is necessarily focused on the past, because the acts that created these sites occurred primarily before the statute was enacted.

Before 1980, there was liability for contamination caused by hazardous waste disposal under the common law of public nuisance and strict liability for harm caused by ultrahazardous activities, as well as under two federal statutes - Section 7003 of the Resource Conservation and Recovery Act of 1976 ("RCRA") and Section 311 of the Clean Water Act (for discharges to waters). So, CERCLA did not create "retroactive" liability in the sense of creating new liability where none previously existed. However, CERCLA was needed to provide response authority and funding for cleaning up hazardous waste sites, and to make the rules of liability consistent and clear on a national basis.

The legislative history of the 1980 enactment of Superfund makes it plain that Congress intended this statute to impose liability on parties for their past acts of disposal. The problems that they were trying to solve - sites such as Love Canal and Valley of the Drums - were by definition problems that had been created by past acts of disposal.

The courts have long since ruled that application of Superfund liability to pre-enactment acts of disposal was clearly intended by the Congress. They have also upheld the

constitutionality of this rule, citing Supreme Court case law that retroactive adjustment of economic burdens is a rational and permissible solution when new problems arising from past activities are discovered, even when those problems result from actions that were lawful at the time. See, for example, Usery v. Turner Elkhorn, 428 U.S. 1, 96 S.Ct. 2882 (1976).

There was also statutory precedent for using retroactive statutory liability to deal with problems created by past practices. Other federal statutes that have imposed retroactive liability include:

- The Black Lung Benefits Act of 1972, which required coal mine owners to pay benefits to coal miners who developed back lung disease, although the owners had not violated any laws or been required to pay such benefits at the time they employed the miners;

- Amendments to the Employee Retirement Income Security Act ("ERISA"), which imposed retroactive liability on employers in order to protect employees' interest in their retirement funds;

- Federal tax provisions, which have sometimes been made retroactive, despite financial loss to taxpayers who relied on provisions in existence at the time they made financial decisions.

Now, 15 years after CERCLA's enactment, there is a renewed attack on CERCLA's retroactive liability by those who claim that it is "unfair."

2. Retroactive Liability is Fair.

I believe that retroactive liability under CERCLA to address the problems created by disposal practices in the past is fair, for several reasons:

First, it is perfectly fair to ask the parties who make a mess to clean it up. Indeed, that has been the common law rule for many years.

Second, the companies who created the problems caused by Superfund sites benefitted economically from the manufacturing and other activities that generated these hazardous wastes, as well as from the inexpensive disposal practices that prevailed prior to 1980. Those who have not yet paid their costs of cleanup continue to this day to benefit economically from the deferred costs of cleaning up their wastes. This is, essentially, a cost of doing business that was simply ignored before CERCLA came along. It should not be passed along to the public when the responsible companies can afford to pay it.

Third, at least some of the companies who disposed of hazardous wastes were well aware of the dangers the wastes posed long before the public was. The lack of public disclosure of the dangers presented by these wastes contributed to the creation of the problem of uncontrolled hazardous waste sites, during the period before the disposal laws caught up to this problem.

3. Consequences of Eliminating Retroactive Liability.

In addition to the "fairness" issue, eliminating retroactive liability under CERCLA would have several negative

policy and practical repercussions.

First, retracting an environmental liability statute after 15 years sends a very bad public message that companies who "lie in the weeds" rather than complying may be rewarded if they hold out for change long enough.

Second, eliminating retroactive liability under CERCLA now would be fundamentally unfair to those good corporate citizens who have cooperated with CERCLA's mandate and voluntarily cleaned up their sites. Perversely, it would reward the recalcitrant parties who have not yet made commitments to clean up their wastes.

Third, if this fairness problem is addressed, as some have suggested, by paying back the companies that already have paid for cleanups, the cost to the public would be very high. Moreover, these "pay back" proposals would effectively change CERCLA from a "polluter pays" scheme into a "pay the polluter" program, sending the worst possible policy message to the public and the regulated community.

Fourth, eliminating retroactive liability now will cause a new explosion of litigation, especially if "pay back" is provided for. The majority of Superfund sites involve pre-1980 liability.² Disputes over who did and did not dispose of hazardous substances before 1980 will cause a new wave of

² I understood that some parties have proposed using a 1987 cutoff date, instead of 1980. This suggestion has nothing to do with the fairness of retroactive liability. Quite obviously, liability between 1980 and 1987 is not "retroactive" at all.

litigation and transaction costs, for both the government and private parties. "Pay back" litigation against the federal government would cause a massive increase in the government's legal costs, diverting funds that should be used for cleanup and leading to no productive result.

Fifth, cleanups are likely to be delayed. The incentives for settlements and voluntary cleanup will disappear. Parties now performing cleanups under unilateral administrative orders are likely to stop cleaning up sites for which they are no longer liable. Those cleaning up under judicial consent decrees are likely to seek revision of those decrees.

Finally, eliminating retroactive liability under Superfund could have a negative impact on states' ability to get their sites cleaned up. Many states rely on CERCLA for authority to compel private parties to pay for cleanup of the sites to which they contributed. In addition, at least 28 states rely on "polluter pays" laws that include retroactive liability. Elimination of CERCLA retroactive liability could make it much more difficult for these states to obtain private party funding for their cleanups. With their limited resources, the states are likely to find it difficult to replace this lost funding. Moreover, eliminating CERCLA retroactive liability would destroy a key incentive for the tens of thousands of voluntary cleanups at non-NPL sites now conducted by responsible parties, in cooperation with the states.

3. Site-Specific Examples

Let me give you a few examples of the kinds of sites that responsible parties could walk away from - and be paid back for - if the proposals to eliminate retroactive liability are adopted.

Hooker Chemical Co., the company that created one of the most infamous hazardous waste sites of all, Love Canal, would be excused from responsibility under CERCLA if retroactive liability is eliminated. Hooker disposed of its hazardous wastes at Love Canal from the 1940's until the 1950's, then sold the disposal property to a local school board for one dollar. Years later, the hazardous wastes seeped into the basements of the homes that had been built around the site, giving rise to great concern for residents' health and causing an evacuation of the homes around the site. The public outcry over this site was one of the primary reasons that Congress enacted CERCLA.

In a subsequent court action, the court found that Hooker knew about the health hazards of exposure to the toxic wastes it had buried, but failed to fully disclose those hazards to the school board or the community. The court found that Hooker's conduct was "inexcusable."

Yet, Hooker could now be excused from responsibility for this site under CERCLA, if retroactive liability is eliminated.

The Scientific Chemical Processing Co. site is located in a densely populated area of Newark, New Jersey. The SCP operation took in wastes disposed of by hundreds of companies.

Because of the hazardous conditions, the State of New Jersey ordered operations at the site to cease in 1980, and the company abandoned it, leaving about 5,000 drums, 53 tanks and numerous other leaking containers of waste solvents, pesticides, acids and caustic solutions. These wastes could ignite easily, or even spontaneously. There was a substantial threat of a major explosion, which would have released a toxic cloud over three major highways and poisoned local residents, 25,000 of whom live within one mile of the site. Over 100 parties who had disposed of waste at the site agreed to perform the cleanup.

Without retroactive liability, this site would have been entirely a government responsibility. Moreover, the "pay back" proposal would require us now to reimburse the responsible parties who created the problem by sending their hazardous waste to the site. That would be hard to justify as a wise and fair use of public dollars.

The City of Elmira, New York lost about 40% of its drinking water supply when its groundwater aquifer became contaminated by hazardous substances released by two industrial facilities located near the City's water supply wells. The companies had disposed of drums of chemical wastes in the ground at these sites from the 1950's until about 1979. Under agreement with EPA, the responsible companies are now working with EPA to remove the drums and contaminated soils to prevent further contamination of the groundwater, capture the contaminated groundwater plume, and treat contaminated water by air stripping

so that the groundwater can continue to serve the City's drinking water needs.

These companies have acted responsibly to address a public health hazard that was created by their operations. If retroactive liability is eliminated, they will be able to pass the problem that they created on to the public.

When you look at these and other site-specific examples of what it will really mean to eliminate retroactive liability, it becomes apparent that "fairness" requires keeping retroactive liability, not eliminating it. The public has been the real victim of Superfund sites, and having those who created the pollution clean it up is a fair public policy.

C. Joint and Several Liability

The rule of joint and several liability is a longstanding common law rule that has been applied by the courts in CERCLA cases brought by the government, at sites where there is more than one responsible party and the harm is indivisible. Indivisible harm often results at CERCLA sites because wastes from different sources are mixed together during treatment or disposal, resulting in an indivisible "toxic soup."

The common law joint and several liability rule, as set forth in the Restatement of Torts, was developed to protect innocent victims from the possibility that they will recover nothing, in cases where harm is indivisible, if they cannot prove the share of the harm caused by each defendant. For example, in the classic case of Summers v. Tice, 33 Cal. 2d 80 (Sup. Ct. Cal.

1948), two hunters in a hunting party shot at a third hunter, and he was hit twice. When the victim brought a claim for his injuries, he could not prove whether one or both of the other hunters had actually injured him, or which defendant had caused which injury. The court ruled that it would be unfair to place this burden of proof on the victim, because he would then recover nothing, even though both of the defendants had acted wrongfully and it was certain that one or both had injured him. Instead, the court ruled, the plaintiff should be allowed to recover from either or both defendants, and the defendants could then apportion the damages between them.

In CERCLA actions the government, on behalf of the public, is the "innocent victim." In cases where the harm is indivisible, the joint and several liability rule allows the government to recover in full from any one or more of the defendants. However, any defendant who pays more than its fair share of the liability to the government can seek "contribution" from the other defendants. See Section 113(f)(1) of CERCLA, which authorizes the courts to allocate CERCLA costs among responsible parties in contribution actions, based on equitable factors.

To encourage responsible parties to enter into settlements with the government, Section 113(f) of CERCLA bars contribution actions against parties who settle their liability with the government (known as "contribution protection"). This effectively gives the government the power to determine when a

responsible party has paid enough, and to protect it from contribution actions and their attendant transaction costs.

The joint and several liability rule, combined with contribution protection for those who settle with the government, serves as a powerful inducement to CERCLA responsible parties to enter into settlements with the government. Any party that declines to join a settlement runs the risk that he will be held liable for an amount that may exceed his "fair share."

In practice, the federal government usually pursues most of the significant contributors of hazardous waste at a site. Parties who reach settlements with the government usually agree among themselves on an allocation of liability. If they feel that some responsible parties have not been pursued by the government, they may seek to bring them into the settlement with the government, or pursue contribution litigation against them.

Unfortunately, the right of contribution has sometimes been abused, when major PRPs pursue small contributors or non-viable parties, or parties against whom there is not good liability evidence. Ordinarily, the government does not pursue such parties as a matter of enforcement discretion, as they would add little to any cleanup. The government may, however, offer a de minimis or an "ability to pay" settlement to such a party, which protects them from further litigation by giving them contribution protection.

If the joint and several liability rule were eliminated, the government would be forced to sue all responsible

parties at every site, and prove the amount of each party's responsibility for the site, in order to compel a private party cleanup or obtain full recovery of the government's costs. At many sites, this would be an impossible burden because of the lack of evidence and the "indivisible harm," and the government might obtain no relief.

Moreover, elimination of joint and several liability would eliminate responsible parties' incentive to settle and clean up sites voluntarily. If each responsible party were liable only for a share of the cost of cleanup, it would be difficult, if not impossible, for the government to convince anyone to enter into a settlement obliging them to clean up the whole site. It would be equally difficult to issue an enforceable administrative order to compel cleanup, as work cannot usually be neatly divided into the appropriate shares.

In addition, the elimination of the joint and several liability rule would cause a steep rise in transaction costs. The program would turn from a settlement program back into a litigation program, and the litigation would become far more difficult and time-consuming than it is under a joint and several liability scheme. To deal with the number of sites in the Superfund system, this type of litigation would require significant additional federal resources.

Therefore, if an effective enforcement program is to be maintained, particularly if it is to continue to be primarily a settlement and voluntary cleanup program, the joint and several

liability rule must be retained as the legal premise of CERCLA liability.

However, to respond to concerns that this rule is capable of leading to unfairness, the consensus bill that was developed in both houses of Congress last year provided a mandatory, non-litigation allocation of liability by a third-party neutral, which would allow responsible parties to have their liability allocated early and without litigation with either the government or each other. This allocation could then be used as a basis for settlement with the government by responsible parties who are willing to clean up their Superfund sites. In addition, Superfund funding was proposed to pay the "orphan share" (of companies who are defunct or unable to pay their share), which now is paid by the viable responsible parties as a result of the joint and several liability rule.

The allocation proposal expressly maintained the joint and several liability rule as the backdrop of liability, to be applied to those who refuse to cooperate and clean up their sites. This rule is essential to maintain both the effectiveness of the enforcement program and the necessary incentives for settlement and voluntary cleanup.

III. Problems and Solutions for Small Businesses

Although the Superfund liability scheme is working well to achieve its basic goal of getting sites cleaned up, liability and potential liability under this statute has given rise to some fears and complaints from various categories of potentially

responsible parties, particularly small businesses. The Administration takes those fears and complaints seriously, and has been making substantial efforts to improve the implementation of the statute to provide relief to a wide array of parties.

Last year, there was broad consensus among a wide variety of parties affected by Superfund on the solutions to the problems of Superfund. Committees of both houses of Congress passed similar versions of the Superfund reform bill, with bipartisan votes. I urge you to look at these bills again, as you search in this new Congress for solutions to the problems of Superfund.

Targeted solutions for small businesses, like those agreed upon last year, are available for each of the specific problems that has been raised. It is simply not necessary to engage in wholesale repeal of the liability scheme in order to solve these problems.

Burdens on De Minimis Parties. Actual or potential Superfund liability can impose disproportionate burdens on "de minimis" parties, who contribute minor amounts of hazardous substances to a site, by forcing them to incur transaction costs that are disproportionate to the total amount of their liability. These so called "de minimis" parties are often small businesses.

The current law has special provisions for prompt settlements with de minimis parties (see Section 122(g) of CERCLA). Recognizing that there were too few of these early settlements in past years, this Administration has made a special

effort to get as many de minimis parties out of the Superfund system as possible. Last year, the government achieved a record number of de minimis settlements, getting more than 4000 parties out of the Superfund system, and that number continues to grow.

Statutory reform could protect small contributors of hazardous substances even more effectively. Effective reforms agreed upon last year included (1) statutory exemptions from liability for parties who sent only tiny amounts of hazardous waste to a site (often referred to as "de micromis" contributors), and (2) encouraging more early de minimis settlements by easing the statutory standards for determining eligibility and establishing time limits for the government to make de minimis settlement offers. If an allocation process is adopted, de minimis settlements should occur before the process starts.

Parties with Inability to Pay. Potential Superfund liability can impose a special burden on parties with "ability to pay" problems, who may incur significant legal fees defending against CERCLA claims that they cannot afford. The government typically enters into "ability to pay" settlements that allow small businesses and individuals that cannot afford to pay the full amount of their liability to pay the government what they can afford and thereby obtain protection from contribution actions.

If small businesses with an inability to pay sent very small amounts of hazardous substances to a site, they should be

exempted from liability (e.g., through the "de micromis" exemption described above) or be eligible for an expedited de minimis settlement. For parties who are above those thresholds, the solution is early, expedited ability-to-pay settlements, similar to de minimis settlements.

Transaction Costs. One of the greatest concerns about the Superfund liability scheme, particularly for small businesses, is the relatively high amount of legal or "transaction" costs that are associated with resolving Superfund liability. The use of a neutral third-party to allocate costs among PRPs could reduce transaction costs significantly, by eliminating the need for expensive and time-consuming contribution litigation to allocate costs.

Limits on contribution actions are key to reducing transaction costs. The statute already provides contribution protection to those who settle with the government, but this bar could be strengthened by requiring any party who sues a settlor to pay the settlor's attorney fees. The same fee shifting provision could be used to protect those who are not liable from frivolous suits.

Prospective Purchasers. We recognize that fears of Superfund liability have had the effect of preventing the sale and redevelopment of Superfund properties, taking some of these properties out of productive economic use. Both prospective purchasers and lenders have been reluctant to invest in these properties, for fear of becoming liable as "owners" of a

Superfund site. This Administration has made a concerted effort to address this problem and promote "brownfields" redevelopment, by undertaking a pilot program to provide assurances that the government will not take action at particular sites against "prospective purchasers."

A statutory exemption for bona fide prospective purchasers, in addition to the statutory protection of lenders described above, would take care of this "brownfields" problem. However, in order to prevent speculators from receiving a windfall when the government cleans up a property at its expense and thereby makes the property more valuable, the prospective purchaser exemption should be accompanied by a "windfall lien" provision that would use profits resulting from the cleanup to pay back the costs of cleanup.

Conclusion

The Superfund enforcement program is now working very well to get the responsible parties to clean up hazardous waste sites. The strict, retroactive, and joint and several liability scheme is fundamental to maintaining this effectiveness. We recognize that there are problems, particularly for small businesses, but those problems all have targeted solutions. It is not necessary or wise to repeal the liability scheme in order to find solutions.



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Congressional Testimony

**Testimony Before the
Committee on Small Business
U.S. House of Representatives
October 19, 1995**

**John Shanahan
Environmental Policy Analyst**

Mr. Chairman and Members of the Committee, thank you for inviting me to appear here today to offer my views on proposals to reform the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA). I want to state that the views I express are my own and do not necessarily reflect the views of The Heritage Foundation.

We are at a critical juncture in the CERCLA reauthorization process. Three basic choices face Congress in reforming the current law: completely overhauling it; fine-tuning it; or inaction. When scrutinized carefully, however, only one solution is practicable or desirable; complete overhaul. CERCLA, or Superfund as it is more commonly known, is widely regarded as a wasteful and ineffective program in dire need of substantive reform. To have true reform, however, we must correct the fundamental flaws in the current program, rather than "tinkering around the edges" as did last year's bills. Reform should address the core elements of the Superfund structure that fuel litigation, slow clean-ups, and raise costs. As important to address, the current law encourages cleanup of sites that pose little risk to human health and safety, and thus diverts scarce economic resources away from hazardous waste sites that may pose real dangers to the public.

The political key to real reform is to end the in-fighting between industry sectors over which sector will win and which will lose with changes in the law. Instead, the focus should be on benefiting all industry sectors so that, even if the mix of benefits is uneven, the least benefited sector or company is substantially better off under the new law.

I cannot stress this point enough. All industry sectors must benefit if reform is to occur. Setting aside issues of ideology, efficiency, or fairness, this law is unlikely to be reauthorized if vocal segments of the business community are made worse off. Without the active support of the entire business community, the process will degenerate into each company vying to cut a deal that benefits itself. Thus, rather than fixing the structure, the new law would merely redistribute wealth to those with the most political muscle. Typically, this means big business will benefit at the expense of small business.

The new law should be fairer, speed cleanups of sites posing real risk, reduce costs across the board, and more fully protect the public from real risks.

Liability reform should:

- ⇒ eliminate most of the need for lawyers and courts;
- ⇒ reduce the total spending by society on CERCLA compliance;
- ⇒ be fairer to those who now pick up the tab for other people's pollution;
- ⇒ encourage timely cleanups;
- ⇒ prioritize risks so that the most public safety possible is bought for the money spent;
- ⇒ reduce potentially responsible parties' (PRPs) annual costs substantially;

While some have stressed individual elements of reform as being more important or deserving of reform than other elements, adopting a piecemeal or distributional approach is counterproductive. Reform must be holistic, taking all aspects of the problem into account, including remedy selection reform which is not the subject of today's hearing. If cleanup standards are improved without fully eliminating the current liability system, the inherent unfairness and inefficiency of the current system still will persist. Thus, companies simply will be encouraged to hire more lawyers to fight their battles in court. If the new law cannot fix this problem, it should be deemed a failure.

Liability changes

One of the most publicized criticisms of Superfund is that instead of monies being spent on cleanup, 80 percent has been spent on lawyers. While this perception is somewhat simplistic and the 80 percent figure commonly cited by the media vastly overstates legal costs, the underlying substance of the criticism is not misplaced. Superfund's structure encourages litigation and other transaction costs due to its liability scheme, and has led to numerous "horror stories" of ordinary Americans and small businesses subjected to millions of dollars in potential liability for what most people would consider innocent acts, some of which were committed by generations now long dead.

Clarify joint and several liability. Joint and several liability is much to blame for causing legal woes of Superfund. Under joint and several liability, a person who contributed even a very small amount to a problem, such as by tossing a car battery into a landfill, potentially could be held responsible for the entire cost of, say, a multi-million dollar cleanup.

The concept is designed to find somebody --- anybody --- to pay for cleanup of hazardous waste. Under the doctrine, the "responsible" person presented with the tab often had only a small part in creating the

waste problem. In practice, this means that a firm with “deep pockets” ends up paying for the cleanup of wastes created by someone else. Naturally, any person or institution identified as a PRP has a strong incentive to prove that others are liable as well, in order to dilute the costs among more PRPs. Hence, litigation is virtually assured.

Superfund should be clarified to specifically preclude joint and several liability. Thus, individuals and companies would not be held responsible for the actions of others. This would send the right economic and behavioral signals to the market, and liability would harness rather than fight market forces. For the first time, the “polluter pays” principle actually would be put into practice.

Repeal retroactive liability. Retroactive liability makes people or firms responsible for activities that took place in the past when the activity was legal. So, for instance, an owner of land is responsible for cleanup of hazardous waste created at the turn of the century by a previous owner. While the Court has not found retroactive liability to violate the Constitution’s prohibition of ex post facto laws, holding people liable for cleanups for actions taken before 1981 is nevertheless unfair to those caught in its web and contrary to the philosophy that underlies this great country. It is worth noting, however, that under the common law, if an

action causes harm to a neighboring property, or a party contributes to a public nuisance, then the party is liable under tort.

Even though the fairness argument is not as compelling for eliminating liability for disposals before 1987 as it is for disposals before 1981, the 1987 date is preferable for a number of reasons. The most important is that CERCLA is only a liability statute. It does not set rules for disposal. That is done by RCRA and other laws. These laws primarily took effect or were modified from 1980 through 1986. For example, RCRA's disposal and record keeping rules were extended to 175,000 more entities in 1986. Unfortunately, many if not most of these companies believed or were legally advised that if they were in compliance with RCRA and the other laws, they could continue their disposal practices. Yet now they are liable under CERCLA for their innocent conduct. The 1987 date is also preferable for the sake of efficiency and lowering total CERCLA cost expenditures by society. Until 1987, disposal rules for all parties were not clear and records under CERCLA are scanty. If the 1981 date is adopted, protracted court battles and slow cleanups would remain at a large number of sites.

Exempt remediation firms and trustees from liability in the absence of gross negligence or willful neglect. These cleanup firms can become liable for problems associated with cleanup, making it difficult to find

quality “construction” firms willing to take the risk of cleaning up problems caused by others. While these firms should be exempt from strict liability as a matter of law --- replacing it with the common law standard of gross negligence and willful misconduct --- PRPs also should be allowed to contract a greater degree of liability to those cleanup firms willing to take the additional risk for higher pay.

Financing

Much of the controversy over liability reform centers around funding. If retroactive, joint and several liability is eliminated, the government would be required to fund the costs of the program that would otherwise be now unfairly borne by PRPs. Ironically, the federal government likely would see its total expenditures on CERCLA decrease even with fundamental liability reform because remedy selection changes would create tremendous cost savings for the Departments of Energy and Defense. Nevertheless, budget rules make it difficult for these savings to cross the “artificial wall” between these Departments and the Environmental Protection Agency. Thus, any projected shortfalls in the first several years of the program would have to be resolved through: 1) increased taxes 2) debt financing; 3) reimbursement delays; or 4) scaling back reform to grant only partial relief from retroactive liability. I will focus on two options which in my

estimation would ensure widespread opposition by creating losers in the process: taxes and partial relief.

Taxes. Imposing new taxes would create the most insurmountable obstacle. Discussion of who would bear the burden of these new federal taxes --- to fund any near term financing shortfall --- has covered the business spectrum. Most of the discussion, however, has focused on taxing the insurance industry to pay for eliminating joint and several liability as well as liability for disposals that occurred prior to 1987. The reason typically given is that it would be unfair for the insurance because they would no longer have liability under the reformed program. But this charge misses the point.

While it is true that insurers would experience the greatest reduction in the percentage of their outstanding liability --- down to zero --- they do not benefit most. Potentially Responsible Parties (PRPs) would experience the greatest cost savings. Although their liability would not be completely eliminated, PRPs gain up to 88 cents of each dollar in cost savings from this liability reform, with insurers gaining only 12 cents, according to insurers. Understandably, insurers believe a new tax that falls fully on their shoulders would not be "fairer."

Another argument often made is that since the insurance industry “offered” to contribute \$800 million last year, it should be willing to contribute the same amount this year. What this argument ignores is that last year’s deal was agreed to by a relatively small number of insurers --- those not bearing the brunt of the tax. Eighty percent of the industry opposed the tax, which was an important factor contributing to the demise of Clinton’s bill in last year’s Democratic Congress.

A tax that is proportional to the amount of cost savings to each industry also is inadvisable. Any such tax scheme would undoubtedly divide each industry, and widespread support for reform would evaporate. Indeed, a tax of any kind poses not only practical problems, but is philosophically inconsistent with platform upon which this Congress was elected.

Partial Relief

Partial relief also is inadvisable. A good example of this approach is the draft bill under discussion in the Commerce Committee. The bill includes numerous exemptions that create winners and losers in the process. While the bill is exceptionally well crafted in some respects, the liability provisions reduce, if not eliminate, its appeal for small businesses. The liability section alone is 80 pages instead of the number required for fundamental reform --- 1-2 pages.

The draft relies on a complicated procedure that creates a "fair share" allocation system, then carves out special exemptions such as for municipal landfills, *de minimis* parties (parties proving they caused less than one percent of the problem), and selected recycling industries. Additionally, there is a retroactive liability discount.

Unfortunately, partial repeal approaches such as this invariably would result in unintended consequences. While the carve out of small businesses would be beneficial, these small businesses must still hire expensive lawyers to prove they qualify for the exception. This can be difficult since typically they do not have records prior to 1986. Moreover, the fair share allocation system would early in the process encourage large business --- with their typically extensive records --- to bring as many small businesses into the Superfund net as possible to diffuse their percentage share. While many of these business would likely qualify for an exemption, they nevertheless would face several years of financial uncertainty and legal costs caused by Superfund that otherwise they might never bear.

Although many small businesses would benefit from this carve out approach, many others would suffer. The potential problems for small businesses are numerous, but are inherent in adopting a partial, "carve

out," approach. Moreover, a partial repeal approach ignores one of the most egregious aspects of Superfund today --- litigation costs.

Fundamental reform must address the enormous waste and unfairness of the current program's liability scheme that virtually compels companies of all sizes to spend their resources and efforts on lawyers rather than cleanup. Liability should be eliminated for all disposals prior to 1987. Liability after that point should be on a fair share basis. Only then will this broken program be fixed.

Thank you.

FUNDING SUPERFUND REFORM WITHOUT A TAX INCREASE

(Need \$2.2 to \$2.4 billion annually)

(in billions)		THESE NUMBERS DO NOT INCLUDE THESE OPTIONS (could be any combination of):	
\$1.5	Direct taxes (see below)	\$0.5	In savings as a result of remedial reform, which is expected to reduce costs by 35%
\$0.25	General revenue taxes		
\$0.2	Agency PRP costs	\$0.2	By requiring States to contribute 10% across-the-board cost share (Oxley bill)
\$0.12	Post-86 PRP liability, emergency removals at non-NPL sites	\$0.3	Capping governmental overhead
\$0.13	PRPs who disposed illegally	\$0.2	Eliminating single-party sites
\$2.2 BILLION TOTAL			

CURRENT SUPERFUND TAXES (in millions):

Oil	\$557
Chemical	\$250
EIT	\$653
TOTAL:	\$1.46

October 19, 1995

Committee on Small Business
U.S. House of Representatives
2361 Rayburn Building
Washington, DC 20515
ATTN: Harry Katrichis, Chief Counsel

Chairman Meyers and Members of the Committee:

On behalf of Calcot, Ltd., a cotton marketing cooperative headquartered in Bakersfield, California, representing 3,400 growers in California and Arizona, I would like to thank you for holding this important hearing on the negative impact to businesses of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

While the Committee on Small Business will not be marking up any rewrite of CERCLA, Calcot would like to take this opportunity to outline a brief synopsis of our story, and ask that the Committee go on record in support of an amendment, described in detail below, to be offered by Congressman Bill Baker, a Member of the House Transportation and Infrastructure Committee. That amendment would provide a legislative fix to the unfairness imposed by strict liability that Calcot, Ltd. and many other businesses face as they attempt to pay to clean up pollution which they did not cause, but is on property they now own.

Calcot's Story

The facts and circumstances surrounding the involvement of Calcot, Ltd. (Calcot) in an investigation of groundwater contaminated with Trichloroethylene (TCE) are not unusual or unique. The involvement, however, demonstrates some of the problems with CERCLA and its state law counterparts.

Calcot owns approximately 235 acres of land which is devoted to warehousing in Fresno, California. Its warehousing activities consist solely of the temporary storage of cotton bales while sales are arranged. There is no manufacturing activity that occurs on the site.

When Calcot purchased the property in 1951, the property was quite distant from urban uses. Over the years, however, the City of Fresno has developed to and around the Calcot property.

In 1988, when Calcot decided to market its property and relocate its facilities, TCE was discovered in groundwater in the immediate vicinity. Although there was no

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evidence that TCE was ever used by Calcot. Calcot was requested to provide information to state regulators. As a result of the information on historical uses of the site, Calcot was placed under order by the California Environmental Protection Agency, Department of Toxic Substances Control (DTSC). DTSC was operating under California's analog to CERCLA, and was also operating in accordance with 42 U.S.C. § 9604(c).

Calcot was directed by DTSC to perform a remedial investigation/feasibility study (RI/FS) because TCE contamination was discovered in groundwater underlying the Calcot property. There were also questions about the activities of prior owners or occupants of the Calcot property. Thus, because Calcot owned the property, it was responsible for the acts of prior owners and occupants, even though Calcot had no involvement or control over these prior owners or occupants.

Calcot has expended more than \$5,000,000 in studies relating to the remedial investigation/feasibility study. These studies have disclosed no evidence that the Calcot property is a source of TCE contamination to the groundwater. Nonetheless, Calcot remains under order and can be forced to participate in a remediation of contamination which, by all evidence, neither it nor its property caused.

Calcot has been forced to prove that its property is not the source of contamination. This is a direct outgrowth and result of the strict liability provisions of CERCLA.

As you know, CERCLA is a no-fault statute. If you own the property and there is contamination on or under the property, you are assumed to be responsible for the clean-up. This places a tremendous burden on the innocent property owner, such as Calcot.

The investigation has indicated that the cause of the contamination is a neighboring property owner. When Calcot first acquired its Fresno property in 1951, the now neighboring property owner was already operating under a lease with Calcot's predecessor in interest on a portion of the property acquired by Calcot. This tenant subsequently purchased the property it leased from Calcot in 1963.

This landlord-tenant relationship by Calcot is enough, under CERCLA, to impose liability on Calcot. It makes no difference that at no time did Calcot ever have possession or control of leased property, nor did Calcot ever have the right or the opportunity to influence waste management decisions on the leased property. Under the strict liability provisions of CERCLA, Calcot is liable for the contamination and for investigation and remediation costs. Moreover, liability under CERCLA is joint and several. This means that Calcot could be responsible for the entire cost of the investigation and remediation, which could run as high as \$45 million.

The Negative Impact of the Supreme Court's Decision in *Key Tronic Corp. v. the United States*

Calcot is also burdened with the impact of the recent United States Supreme Court Case *Key Tronic Corp. vs. United States*. In that case the Supreme Court decided that Congress did not give private litigants the right to recover attorney's fees they incur in bringing a cost recovery action under CERCLA § 107. The ruling runs counter to the remedial purpose of CERCLA, since the ruling would actually discourage companies from undertaking voluntary clean-up.

As an example, if Company A was the actual cause of contamination, and Company B was an adjacent property owner, Company B, before the *Key Tronic* case, could decide to voluntarily undertake the remediation of the contamination. Once the remediation was completed, Company B could then bring a lawsuit in federal court under CERCLA for its necessary costs of remediation and investigation. If Company B could be awarded its attorneys' fees, there would be an incentive both for Company B to perform the voluntary investigation and remediation, and to seek contribution from Company A. There would also be a disincentive for Company A to engage in stalling and delaying tactics, both in terms of assuming its responsibility for investigation and clean up of the contamination it caused, as well as for resolving the contribution claims of Company B.

Under *Key Tronic*, however, there is no longer an incentive for either Company to move forward voluntarily. If Company B were to undertake the clean up, and then sue Company A, Company A would have no reason to promptly resolve this litigation. In fact, Company A could proceed with an intentional course of delaying the litigation, and throwing up enough roadblocks to avoid having to make any significant contribution for the clean up of the contamination it caused. Such a result clearly is not consistent with the purposes and intent of CERCLA.

The Baker Amendment Would Provide Relief for Innocent Property Owners Who Have Initiated Clean Up

In light of this unfairness, Congressman Bill Baker of California has authored an amendment which would be declarative of existing law on the "response costs" question, thereby reversing *Key Tronic*. His amendment would make it clear that innocent companies like Calcot that have moved forward with clean up of property they own, but did not pollute, should be able to recoup from the actual polluters all reasonable costs incurred. Specifically, Congressman Baker's amendment would:

- apply only to prospective cases and cases which are not yet final as of the date of enactment;

- make explicit that reasonable attorneys' fees expended by one private party seeking contribution from another private party (the actual polluter in Calcot's case) are recoverable;
- provide that a party is not entitled to recover attorneys' fees in a meritorious action where a state, the federal government or an Indian tribe has commenced the action against that party and that party was named as a potentially responsible party (PRP);
- provide that a PRP is not entitled to recover attorney's fees at a Superfund site if that party has neither resolved its liability nor agreed to perform a response action;
- except de minimis contributors of hazardous wastes from being liable for attorneys' fees;
- provide that attorneys' fees are not recoverable unless the party seeking them from the polluter provides notice that they will be sought before the action is commenced, or in the case of ongoing actions, within 30 days of the enactment of the amendment;
- provide that attorneys' fees are not recoverable unless the party seeking them allows adequate time for settlement of the action.

Thresholds are Unreasonable Where There Is No Health Risk Involved

One further point that warrants discussion deals with the threshold requirements for requiring a remediation/investigation effort. Calcot has been required to investigate the source of "contamination" on a portion of its property in a situation where there is no health risk involved. The water in question is suitable for drinking under standards adopted by the EPA. Nonetheless, Calcot has been forced to expend thousands of dollars to identify the source of the contamination. If the water can be used for drinking purposes, why should Calcot be forced to spend considerable sums of money in an effort to locate the source of contamination? CERCLA, and its state analogs, however, give the regulators this authority because any amount of material deemed hazardous is sufficient to impose CERCLA liability.

Conclusion

As we have noted, the facts involving Calcot are not unique. Calcot is a property owner for which there is no evidence that it has caused the contamination being addressed by a governmental agency. An adjacent property owner through its manufacturing processes caused the contamination. Nonetheless, because of the wide net of CERCLA, and the unforgiving nature of the strict liability, and joint and several liability imposed by CERCLA, Calcot now has property which has been tainted with the label of "a contaminated site."

We do not believe that CERCLA was intended to punish the landowner or force solvent companies to the brink of financial ruin. The desire of CERCLA to require the party causing the contamination to clean up the contamination is worthwhile. That purpose, however, is not met under the current law. Significant changes to address the major issues facing Calcot, and numerous other property owners, need to be implemented at this time. As a step in that direction, Calcot respectfully requests that the Committee on Small Business go on record in support of the Baker Amendment.

Again, thank you for your attention to the impact of CERCLA on businesses such as Calcot.

Sincerely,



Tom Smith
President
Calcot, Ltd.



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